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Supreme Court, U.S.
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No.

# In the Supreme Court of the United States

ZUNI PUBLIC SCHOOL DISTRICT NO. 89 AND GALLUP-MCKINLEY COUNTY SCHOOL DISTRICT NO. 1,
*Petitioners*,

v.

UNITED STATES DEPARTMENT OF EDUCATION,
*Respondent*,

NEW MEXICO STATE DEPARTMENT OF EDUCATION,
*Intervenor*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

The Federal Impact Aid Program, 20 U.S.C. § 7709, was enacted to subsidize local State school districts which have a federal presence within the district such as military bases or, as in the present case, Indian Reservations. These local districts are not able to tax such federally impacted lands. The Impact Aid Program prohibits the State from counting these federal subsidies as part of an impacted district's budget when the State allocates operational funds to the local districts, unless the State's operational funding to districts throughout the State is "equalized" under an equalization formula under the Impact Aid Program. If the State's operational funding is determined to be "equalized," the State can reduce operational funding to an impacted district by the amount of the Impact Aid subsidy.

In 1994, the equalization formula was statutorily created and effectively repealed the equalization formula previously created by the Secretary of the United States Department of Education by regulation. However, in 1996, the Secretary, by regulation, reinstated his repealed and cc `flicting equalization formula and refuses to follow Congress' equalization formula. Under Congress' formula, New Mexico is not "equalized" and the intended beneficiaries receive the Impact Aid. Under the Secretary's formula, New Mexico is deemed "equalized" and the Impact Aid is taken from the impacted districts. The impacted districts are losing approximately $50,000,000 per year in Impact Aid. The Tenth Circuit was split 6 to 6 on the question, leaving the Secretary's formula in effect.

The question presented is:

1. Whether the Secretary has the authority to create and impose his formula over the one prescribed by

Congress and through this process certify New Mexico's operational funding for fiscal year 1999-2000 as "equalized," thereby diverting the Impact Aid subsidies to the State and whether this is one of the rare cases where this Court should exercise its supervisory jurisdiction to correct a plain error that affects all State school districts that educate federally connected children.

## PARTIES TO PROCEEDINGS

Petitioners are New Mexico public school districts.

Respondent is the United States Department of Education.

Intervenor is the New Mexico State Department of Education.

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Petitioners Zuni Public School District No. 89 and Gallup-McKinley County Public School District No. 1 respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

## OPINIONS BELOW

The *Per Curiam* ruling of the United States Court of Appeals for the Tenth Circuit dated February 23, 2006 is officially reported at 437 F.3d 1289 and is reproduced in App. at 2a.

The Opinion of the United States Court of Appeals for the Tenth Circuit dated December 30, 2004 was vacated and is reproduced in App. at 3a.

The decision of the Secretary of the United States Department of Education dated October 11, 2001 is reproduced in App. at 34a.

## JURISDICTION

The order of the United States Court of Appeals for the Tenth Circuit sought to be reviewed was entered on February 23, 2006. This petition is timely under 28 U.S.C. § 2101 and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the order sought to be reviewed. This court has jurisdiction to review the order of the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 1254. Federal jurisdiction is invoked under 20 U.S. C. § 7711(b)(1) which allows appeals of decisions of the Secretary to the United States Court of Appeals.

## STATUTORY PROVISIONS INVOLVED

The statutory and regulatory provisions relate to the federal Impact Aid Program and are:

1. 20 U.S.C. § 240(d) repealed (App. at 69a)
2. 20 U.S.C. § 7709 (2000) (App. at 59a)
3. 34 C.F.R. Part 222, Subpart K (2000) (including App. to Subpart K) (App. at 76a)
4. Former 34 C.F.R. §222.63 (1993) (App. at 97a)
5. Former 34 C.F.R. App. §222 (1993) (App. 99a)

## STATEMENT OF THE CASE

The Zuni Public School District is a New Mexico public school district located entirely within the Pueblo of Zuni Reservation. It has virtually no tax base. Over 65% of the Gallup-McKinley County Public School District No. 1 consists of Navajo Reservation lands which are also not taxable by State school districts. Under the Impact Aid Program (20 U.S.C. § 7709 *et seq.*) public school districts such as Zuni and Gallup impacted by a federal presence which reduces ordinary bonding and taxing capacity are entitled to receive federal Impact Aid funding to offset the negative financial impact of this federal presence. *Indian Oasis-Baboquivari Unified School District No. 40 of Pima County v. Kirk*, 91 F.3d 1240 (9th Cir. 1996). The Impact Aid Program, however, allows States to take credit for the Impact Aid payments by correspondingly reducing operational funding to Impact Aid districts if the State can establish that operational funding for its school districts (statutorily referred to as LEAs) is otherwise "equalized." Under Congress' 1994 formula (the current statutory formula) a 25% disparity in per-student funding is permitted between the highest funded LEA and the lowest funded LEA in a field of LEAs identified

under the statutory formula. Under this formula, all LEAs are first ranked by per-student funding. The Secretary of the United States Department of Education (the "Secretary") is then instructed by statute to "disregard local educational agencies (LEAs) with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State. . . ." (20 U.S.C. § 7709(b)(2)(B)) (App. at 61a). The Secretary, however, has by regulation created a formula which uses a different method for developing this final field of LEAs. Congress' formula eliminates percentiles of "LEAs." The Secretary eliminates percentiles of "pupils," (App. at 92a) and is thereby able to develop a much reduced field of LEAs for use in making the equalization determination. This produces a radically different outcome than required by the statutory formula enacted in 1994.

The statutory formula was followed and reproduced by the Secretary in the body of the regulations at 34 C.F.R. 222.162(a) (Subpart K) (App. at 81a). Under the statute and the body of the regulation, in making the "equalization" determination the Secretary is to "disregard LEAs with per pupil expenditures or revenues above the 95th or below the 5th percentile of those expenditures or revenues in the State." (App. at 81a). The Appendix to this regulation provides what purports to be an example of a calculation made under the statutory and regulatory formula. However, instead of reflecting the statutory formula, the Appendix example uses the Secretary's pre-1994 equalization formula created by regulation in 1976 but which was specifically repudiated by the 1994 statute. Under the Appendix formula, instead of disregarding "LEAs with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile. . .," as required by the Congress, the top 5% and bottom 5% of "pupils" are eliminated to determine the LEAs to be used in

the final calculation.[1] (App. at 92a) The Secretary insists on following the Appendix formula.

Under Congress' formula, New Mexico's operational funding is not "equalized" and New Mexico's federally impacted districts are entitled to retain their share of approximately $50,000,000 of Impact Aid funds without suffering offsetting reductions in their State provided operational funding. Under the Secretary's formula, more than twice as many LEAs are excluded from the final field, New Mexico's funding is deemed "equalized," and New Mexico is permitted to reduce operational funding to the federally impacted districts by the amount of their Impact Aid receipts.[2] To further allow a State to qualify for the equalization exception, weighted funding from the State to LEAs to help cover costs associated with unique conditions found in certain LEAs such as low student count, urban density, rural location, etc. (34 C.F.R. § 222.162(c)(2)) is backed out to establish a base funding level (App. at 82a). Even with this weighted funding backed out, in New Mexico the highest per student operational funding for all LEAs is $6,520 and the lowest is $2,672 per student, a disparity of approximately 244% (App. at 212a). Under Congress' formula, 10 LEAs of the 89 LEAs are eliminated to form the final field. (App. at 24a). Under the Secretary's formula, 25

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[1] Under the example in the Secretary's Appendix, LEAs are ranked in order of wealth. Five percent of the entire State student population is eliminated from the top ranked LEAs and then bottom ranked LEAs. As students are subtracted, LEAs are eliminated and the remaining field of LEAs is established. In stark contrast, under the statute, percentiles of LEAs are eliminated without reference to pupils.

[2] New Mexico by statute takes credit for 75% of the Impact Aid payments. NMSA 1978 § 22-8-25. (App. at 72a)

out of 89 LEAs (or approximately 28% of all LEAs) are eliminated and the disparity is reduced to 14.43%. (App. at 45a-46a)

The legislative and regulatory sequence is as follows.

1. Prior to 1974, all Impact Aid went to the recipient school districts.

2. In 1974, Congress enacted 20 U.S.C. § 240(d), which was later repealed. (App. at 69a) This allowed States to take "into consideration, Impact Aid payments, provided there were equalized operational expenditures made to school districts." The term "equalized expenditures" was to be "defined by the Secretary by regulation." (App. at 70a)

3. In 1976, the Secretary conducted a series of "comments and responses" relating to the formulation of the regulations. One exchange discussed whether it was preferable to eliminate percentiles of LEAs or percentiles of pupils in developing the final field of LEAs. Some experts recommended the percentile elimination of LEAs. Others recommended the percentile elimination of pupils. The Secretary chose to eliminate percentiles of pupils. (App. at 129a-131a)

4. The Secretary then published the "equalization" regulation in 1976 (App. at 141a). The Secretary, in the body of the regulation (§ 115.62(b)), established the disparity limit at 25%, but did not further define the process except through the Appendix to the regulation. (App. at 99a, 159a)

5. The Appendix provided:

> Identifying those local agencies in each ranking which fall at the 95th and 5th percentile of the total number of pupils in attendance in the schools of these agencies. . .. (Emphasis added)

6. In 1993, this regulation was codified as 34 C.F.R. § 222.63. (App. at 97a)

7. In 1994, the system changed with the enactment of 20 U.S.C. § 7709. This statute removed the Secretary's authority to establish the equalization formula. Instead, a new and different equalization formula was created by statute. Now, instead of eliminating pupils above the 95th percentile and below the 5th percentile, the statute required the Secretary to "disregard local educational agencies with per pupil expenditures or revenues above the 95th percentile or below the 5th percentile" (§ 7709(b)(2)(i)) thus reversing the Secretary's 1976 decision to eliminate pupils instead of LEAs. (App. at 61a)

8. The Secretary subsequently enacted regulation 34 C.F.R. § 222.162(c) (Subpart K) the body of which mirrored the 1994 statutory change. (App. at 76a, 81a)

9. However, the Secretary then followed with an Appendix to the regulation. That Appendix purported to provide an example of how the statutory formula was to be applied. In the example set out in the Appendix, instead of disregarding "LEAs with per pupil expenditures or revenues above the 95th percent

> -or below the 5th percentile . . ." as required by the statute, the Secretary eliminated the top 5% and bottom 5% of "pupils," repeating virtually verbatim the 1976 formula and defying Congress' clear change. (App. at 92a)

Impact Aid funding in New Mexico in 1999-2000 was approximately $62,671,000[3], went to 30 of 89 LEAs and was about 2.7% of New Mexico's total operational budget.[4] Impact Aid is provided to every State in the country which is impacted by a federal presence. However, only New Mexico, Kansas and Alaska currently attempt to take credit for the Impact Aid in distributing their other operational funds to LEAs.

An annual certification hearing before the United States Department of Education is conducted to determine whether a State's operational funding is equalized. This hearing was conducted for fiscal year 1999-2000 and objection was made to the Secretary's use of the formula in the Appendix as opposed to the statutory formula. (App. at 222a) The Secretary insisted on using the Appendix formula and New Mexico's funding was determined to be "equalized." (App. at 41a) Petitioners sought a hearing before a United States Department of Education administrative law judge pursuant to procedures set forth in 20 U.S.C. § 7711(a). Hearings were conducted before the administrative law judge who shared Petitioners' concern that the Appendix being followed by the Secretary could not be reconciled with the statutory formula. At the conclusion of the hearing, however, the administrative law judge questioned whether, as an employee of the United States Department of Education, he could invalidate the

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[3] App. at 226a, 234a

[4] App. at 234a-236a

Appendix created by the Secretary, citing certain judicial precedent. Ultimately, the administrative law judge ruled that he did not have that power and could not rule on the validity of the formula in the Secretary's Appendix. (App. at 43a) That decision was appealed to the Secretary seeking to prohibit use of his Appendix. The appeal was denied. (App. at 34a)

Petitioners appealed to the Tenth Circuit Court of Appeals pursuant to 20 U.S.C. § 7711(b)(1). A three judge panel of the Tenth Circuit Court of Appeals issued its opinion on December 30, 2004. Two of the judges affirmed the decision of the Secretary and one judge dissented. (App. at 3a) Petitioners successfully petitioned for rehearing en banc. The decision of the three judge panel was withdrawn. Months after a second oral argument, the Tenth Circuit announced that the 12 members of the *en banc* panel were evenly divided and no decision would be issued. (App. at 2a) The decision of the Secretary stood by default. Accordingly, the only articulated review on the merits the Petitioners have received is from the Secretary of the Department of Education sitting in a quasi-judicial capacity judging a challenge to his own actions.

## REASONS FOR GRANTING CERTIORARI

### I. THE STATUTES AND REGULATIONS

The pertinent parts of the relevant statutes and regulations are reproduced in the Appendix and display a statute and a regulatory appendix which are irreconcilable.

Petitioners understand that a detailed analysis of the merits of a case is not always the appropriate vehicle for convincing this Court to accept a Petition for Writ of Certiorari.

However, in this instance, an analysis of the merits establishes the clear wrong being committed by the Secretary, invokes the strong public policy against an administrative agency defying an act of Congress and doing as it pleases and reveals the resulting substantial economic loss of federally impacted districts for whom the Impact Aid Act was created.

## II. THE IMPACT AID FORMULA AND *CHEVRON* ANALYSIS

The Impact Aid Program, 20 U.S.C. § 7709, prevents the State from taking credit for Impact Aid payments in determining the amount of operational funding to be allocated to a federally impacted LEA.[5] An exception exists for a State with "a program . . . that equalizes expenditures for free public education among local educational agencies in the State." 20 U.S.C. § 7709(b)(1). A State's educational spending is equalized "if . . . the local educational agency in the State with the highest such per-pupil expenditures or revenues did not exceed the amount of such per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the lowest such expenditures or revenues by more than 25%." 20 U.S.C.

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[5] 20 U.S.C. § 7709(a) General Prohibition

Except as provided in subsection (b) of this section, a State may not –

(1) consider payments under this subchapter in determining for any fiscal year –

(A) the eligibility of a local educational agency for State aid for free public education; or

(B) the amount such State aid; or

(2) make such aid available to local educational agencies in a manner that results in less State aid to any local educational agency that is eligible for such payment than such agency would received if such agency were not so eligible.

§ 7709(b)(2)(A). In developing the field of LEAs against which this percentile differential is developed, the Secretary is required to "disregard local educational agencies [LEAs] with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State." 20 U.S.C. § 7709(b)(2)(B)(I). As the dissent in the withdrawn Tenth Circuit Court of Appeals Opinion (App. at 24a-29a) put so succinctly:

> These requirements are unambiguous. A percentile is a mathematical concept not admitting of multiple interpretation; it is a simple, straightforward method of ranking an array of values. Attached to this dissent is Exhibit A. (App. at 30a) It lists all of the 89 New Mexico LEAs along with the per-pupil revenues for each. Analysis of that array yields a value of $3,650.40 for the 95th percentile and $2,803.80 for the 5th percentile. Five districts are above the 95th percentile and five districts fall below the 5th percentile; they are excluded from further analysis. After the exclusion, Gadsden district has the lowest per-pupil revenues ($2,829). When those revenues are multiplied by 125%, the result is $3,536, an amount less than the highest non-excluded district, Maxwell – with per-pupil revenues of $3,591. The 25% test is not met. New Mexico has not equalized school funding as statutorily required. Therefore, federal Impact Aid cannot be counted as part of the LEAs resource.

Contrasted against Congress' formula is the Secretary's formula described by the dissent as "complex and mystifying." (App. at 25a) Here, the Secretary does not eliminate percentiles of LEAs. Instead, the Secretary replaces Congress' percentiles of LEAs with percentiles of pupils. The

LEAs are ranked in accordance with wealth. Then the Secretary eliminates the top 5% of the pupils of those ranked LEAs. As the pupils are eliminated, so are the LEAs with which they are associated. The same process is applied to pupils at the bottom of the ranking. This clearly conflicts with the Congressional mandate. Initially, it is bewildering why the Secretary would eliminate percentiles of pupils (Why not eliminate percentiles of teachers or administrators or football fields?). However, the statutory and regulatory history is revealing. The Secretary apparently took umbrage at Congress removing his authority to establish the equalization formula and repealing the formula which the Secretary had previously developed through regulation. The Secretary repeated the 1994 statutory equalization formula in the body of his regulation, but then installed, almost verbatim, his pre-1994 formula in the example set forth in his Appendix, apparently believing that his defiance of Congress would go undetected. It almost did.

Whether the Secretary has exceeded his statutory authority in creating and following his Appendix equalization formula is determined under the two step test established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). That analysis distinguishes between the absence of authority to act and the arbitrary exercise of valid authority. Step one addresses the existence of agency authority. Step two, addressed only if the agency has authority, tests whether the exercise of such discretion is arbitrary and capricious.

The Secretary in these proceedings has glided over step one and argues that eliminating pupils instead of LEAs is a reasonable approach and deserving of deference. However, the Secretary does not identify the source of his authority to countermand a federal statute which removed his former

authority to create the equalization formula and by the same statutory action mandated that the equalization formula involve the elimination of LEAs and not pupils, a significant distinction and the subject of pre-regulation policy discussions in 1976. There is no such authority. It is "axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). "[N]o matter how important, conspicuous, and controversial the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, . . . an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (internal quotations omitted); *see also Louisiana Pub. Serv. Comm'n v. Federal Communications Commission*, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act . . . unless and until Congress confers power upon it").

*Chevron* is clear in its holding:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether an agency's answer is based on a permissible construction of the statute. *Id.* at 842-43

Even if one could read an ambiguity into Congress' formula, this is not a license for the Secretary to do as he pleases. A permissible construction is one consistent with the statute. *Manning v. U.S.*, 146 F.3d 808 (10th Cir. 1998). *Chrysler Corp. v. Brown*, 441 U.S. 281, 285 (1979). "*Chevron* deference, however, is not accorded merely because the statute is ambiguous and an administrative official is involved. To begin with, the rule must be promulgated pursuant to authority Congress has delegated to the official. *Gonzales v. Oregon*, at ___ U.S. ___, 126 S. Ct. 904, 916 (2006); *United States v. Mead Corporation*, 533 U.S. 218, 226-227 (2001). The 1994 legislation makes clear that the Secretary was divested of his authority to continue using the old equalization formula and diverting Impact Aid funds from impacted districts to the State. *See, Gonzales v. Oregon*, ___ U.S. at ___, 126 S.Ct. at 921.

The idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the CSA's registration provision is not sustainable. "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001); *see FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.")

In the case at bar, Congress in 1994 rescinded the Secretary's authority to establish the equalization formula and mandated use of a different formula. The Secretary is required to use Congress' formula, not ignore it and then

reassert his statutorily repealed formula.[6] This action of the Secretary involves more than administrative overreaching. The Secretary cannot maintain with any candor that there is sufficient flexibility within Congress' legislation to allow the Secretary to create an equalization formula that eliminates percentiles of pupils and not LEAs. The difference between these approaches was a significant focus of discussion thirty years ago when the Secretary was developing his original regulations. It is absolutely clear in the historical context of the development of the equalization formula, eliminating percentiles of LEAs precludes elimination of percentiles of pupils. "Ambiguity is a creature not of definitional possibilities but of statutory context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. at 133, *Davis v.*

[6] It is noteworthy that while the Secretary requests and in fact needs unprecedented deference to support his position, the regulatory process he conducted in 1995 reveals the request to be disingenuous. In his own published regulations (App. at 163a-164a), the Secretary claimed that his new regulations had no significant economic impact and were essentially busy work of little consequence, qualifying the regulatory process for an exception under 5 U.S.C. §533(b)(B) from public notice and comment requirements when such process is "unnecessary" or "contrary to the public interest." The Secretary did not even contend that his regulations qualified for the public notice and comment exception under 5 U.S.C. §533(b)(A) when the proposed regulations are "interpretative." With the Secretary's 1995 regulations not even being "interpretative," no deference should be paid to these regulations as being useful in interpreting a federal statute. Even interpretative regulations are generally only given deference to the extent they interpret an agency's own regulations, not a federal statute. *Auer v. Robbins*, 519 U.S. 452, 461-462 (1997); *Gonzales v. Oregon*, ___ U.S. at ___, 126 S.Ct. at 916. Also, "regulations . . . not promulgated as substantive rules . . ." do not have the "binding effect of law." *Chrysler Corp. v. Brown*, 441 U.S. at 315.

*Michigan Department of the Treasury*, 489 U.S. 803, 809 (1989).

The Secretary's formula finds no Congressional support and is of no force or effect. *Gonzales v. Oregon, supra* (regulation enacted by United States Attorney General attempting to regulate controlled substances was invalid due to lack of authority); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. at 126 ("Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" FDA regulations purporting to control the tobacco industry struck down.)

## III. CONFLICT WITHIN THE TENTH CIRCUIT COURT OF APPEALS AND FAILURE TO HAVE A SUBSTANTIVE AND DEFINITIVE REVIEW OF THE SECRETARY'S ACTION.

A three judge panel of the Tenth Circuit Court of Appeals initially issued a majority decision which confirmed the decision of the Secretary of the Department of Education. The dissenting judge issued a vigorous and pointed dissent. The Petitioners sought an *en banc* review. It was granted and the Tenth Circuit decision was withdrawn in its entirety. Twelve judges participated in the *en banc* review. The Court reported that the panel was evenly divided and could not issue a decision on the merits. The original Tenth Circuit decision was vacated and by default the Secretary's decision was affirmed. One consideration in determining whether a petition for certiorari should be accepted is a divided appellate court. *Oil Workers Union v. Mobile Oil Corp.*, 426 U.S. 407 (1976); *Communications Workers America, et al., v. Beck, et al.*, 487 U.S. 735 (1988); and *Rinaldi v. United States*, 434

U.S. 22 (1977). In *Ratchford, President, University of Missouri, et al., v. Gay Lib, et al.*, 434 U.S. 1080 (1978), Justices Rehnquist and Blackmun joined in a written dissent to a decision of the majority of the Supreme Court to deny certiorari.

> Courts by nature are passive institutions and may decide only those issues raised by litigants in lawsuits before them. The obverse side of that passivity is the requirement that they do dispose of those lawsuits that are before them and entitled to attention. The District Court and the Court of Appeals were doubtless as chary as we are of being thrust in the middle of this controversy but were nonetheless obligated to decide the case. Unlike the District Court and the Court of Appeals, Congress has accorded to us through the Judiciary Act of 1925, 28 U.S.C. §1254, the discretion to decline to hear a case such as this on the merits without explaining our reasons for doing so. But the existence of such discretion does not imply that it should be used as a sort of judicial storm cellar to which we may flee to escape from controversial or sensitive cases. *Id.* at 1081.

One possible interpretation of the action or lack thereof by the Tenth Circuit Court of Appeals is that six of the judges did not want to disturb the status quo but could not author a credible decision which supported the Secretary's actions. Petitioners believe that an issue of such magnitude and consequence should receive meaningful review. This need is not met by a quasi-judicial review by the Secretary of his own actions.

## VI. IMPORTANCE OF IMPACT AID TO RESERVATION DISTRICTS AND MILITARY DISTRICTS

The Impact Aid Program was created to "fulfill the Federal responsibility to assist with the provision of educational services to federally connected children in a manner that *promotes control by local educational agencies with little or no Federal or State involvement.*" 20 U.S.C. § 7701 (emphasis added). The merits of this case are clear. Congress created one equalization formula and the Secretary insists on using another. Given the legislative and regulatory history and the obvious differences between the Secretary's and Congress' equalization formulas, the controversy within the Tenth Circuit must have centered around something other than the merits of the case. Perhaps it was thought to be more important for New Mexico to be able to rely upon Impact Aid to fund its general educational operations than for impacted LEAs to receive the Impact Aid. While Congress' wisdom should never be a judicial issue, apparently it has been in these proceedings.

New Mexico could adjust its operational funding system so that it is equalized. It has chosen not to do so. Including all 89 LEAs, a 244% disparity in per student funding exists between the top ranked LEA and the bottom ranked LEA. No policy reason for such a disparity has ever been articulated. Also, if the impacted districts receive their Impact Aid, Gallup-McKinley moves to about the middle of the rankings in expenditures per student, Zuni moves to fourth from the top and the district of Alamogordo, which contains a military base, moves up about four positions. (App. at 212a, 226a and 234a)

Most importantly, educating Native American children in rural, isolated environments involves special problems stemming from poverty, social conditions, language differences and cultural differences. A compromised or, in Zuni's case, a non-existent bonding and taxing capacity resulting from a federal presence has far reaching consequences. New Mexico's capital improvement funding system has been declared unconstitutional by a New Mexico District Court (App. at 227a) and the ongoing attempts by the Legislature to meet the District Court mandate continues to be monitored by the District Court. Property taxes, bonds and mill levies are major sources for districts with healthy bonding and taxing capacities to fund capital improvements. Those without such bonding capacities have limited options. Without quality facilities, including staff housing, isolated districts have difficulty attracting and retaining staff. Further, to attract staff, these districts must devote a greater percentage of their budget to salaries. Even with this, the turn over rate for staff remains high. Under New Mexico's operational funding system, additional payments are made to districts which employ experienced and advanced degreed teachers. This additional funding is substantial.[7] The result is that the "desirable" districts easily retain their teachers and receive additional funding to support their higher salaries, while the impacted district does not receive the additional funding but has to pay the higher salaries, thus diverting funds needed for other programs. While Impact Aid retained by New Mexico is only 2.7% of its operational budget, spreading an additional $50,000,000 around the thirty impacted districts would ease

[7] *See*, App. at 237a, NMSA 1978 §§22-8-4 and 22-8-25D.(4). The training and experience index which ranges between 1.000 and 1.316 is used to multiply units (essentially per student funding). For 10,000 units, Gallup's training and experience index would produce an extra $934,800, while a higher training and experience index of 1.271 would produce an extra $6,666,600.

some of the disability under which they operate and achieve the Congressional purpose underlying the Impact Aid program.

## V. THIS COURT'S SUPERINTENDING CONTROL

The administrative law judge and the Tenth Circuit Court of Appeals failed to substantively rule on the actions of the Secretary. It is assumed that the Secretary would in a quasi-judicial capacity defend his own administrative actions. However, one assumes that the judiciary would not be similarly predisposed and a fair judicial review of the Secretary's actions under the *Chevron* standard would occur. To date there has been no substantive review and explanation of the Secretary's actions.

Petitioners submit that this is a matter of compelling importance, as the decision of the Secretary to impose his unauthorized formula will undoubtedly be repeated every year during the federal certification process, and has been in the years following 2000. Allowing New Mexico and perhaps other jurisdictions to qualify for the exception under an unauthorized construction of the Impact Aid Program at the expense of Congress' intended beneficiaries should be compelling reason for this Court to exercise its supervisory power and decide this matter on certoriari. *See*, *Florida v. Rodriguez*, 469 U.S. 1, 7 (1984), where Justice Stevens stated:

> As the Court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation.

Petitioners' claim goes far beyond a request for pure error correction.

Further, this appeal to the Tenth Circuit related to a certification determination for the fiscal year 1999-2000. It is now 2006. For each of the approximately six years that have since passed, the Secretary has continued to impose the Appendix formula and determined that New Mexico is equalized. Administrative appeal proceedings, however, have been stayed pending the final outcome of this fiscal year 1999-2000 appeal and now this application for certiorari. If certiorari is not granted, then a hearing will be conducted before the administrative law judge for the fiscal year 2000-2001 and, assuming the same result, another appeal will be brought before the Tenth Circuit. Until there is a change in the collective mind or the composition of the Tenth Circuit, there will continue to be repeats of this futile ritual. Until a dispositive judicial review of the Secretary's actions occurs, a clear impropriety will persist.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX A

## UNITED STATES COURT OF APPEALS
## FOR THE TENTH CIRCUIT

**No. 01-9541**

**[Filed February 23, 2006]**

| | |
|---|---|
| ZUNI PUBLIC SCHOOL DISTRICT NO. 89; GALLUP-MCKINLEY COUNTY PUBLIC SCHOOL DISTRICT NO. 1, Petitioners, | ) |
| vs. | ) |
| UNITED STATES DEPARTMENT OF EDUCATION, Respondent. | ) |
| NEW MEXICO STATE DEPARTMENT OF EDUCATION, Intervenor. | ) |

ON REHEARING EN BANC FROM A DECISION
OF THE SECRETARY OF THE UNITED STATES
DEPARTMENT OF EDUCATION
(Docket No. 99-81-I)

Before TACHA, Chief Judge, SEYMOUR, EBEL, KELLY, HENRY, BRISCOE, LUCERO, MURPHY, HARTZ, O'BRIEN, McCONNELL, and TYMKOVICH, Circuit Judges.

## OPINION

PER CURIAM.

Two local educational agencies (LEAs) (Zuni Public School District No. 89 and Gallup-McKinley Public School District No. 1) filed a petition for review from the Secretary of Education's decision that the State of New Mexico was equalized pursuant to 20 U.S.C. § 7709(b) and the corresponding regulations at 34 C.F.R. § 222.162(a). *See also id.* pt. 222, subpt. K, app. A divided panel of this court denied the petition for review. *Zuni Pub. Sch. Dist. No. 89 v. U.S. Dep't of Educ.*, 393 F.3d 1158, 1169 (10th Cir. 2004). We granted rehearing en banc, and in accordance with our local rule, the judgment was vacated, the mandate stayed and the case was restored as a pending appeal. 10th Cir. R. 35.6. On rehearing en banc, the decision of the Secretary is affirmed by an equally divided court. The panel decision is hereby vacated. *See id.*

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## APPENDIX B

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**UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

**No. 01-9541**

**[Filed December 30, 2004]**

| | |
|---|---|
| ZUNI PUBLIC SCHOOL DISTRICT NO. 89; GALLUP-MCKINLEY COUNTY PUBLIC SCHOOL DISTRICT NO. 1, Petitioners, | ) |
| v. | ) |
| UNITED STATES DEPARTMENT OF EDUCATION, Respondent. | ) |
| NEW MEXICO STATE DEPARTMENT OF EDUCATION, Intervenor. | ) |

Petition for Review from a Decision of the
Secretary of the United States Department of Education
Docket No. 99-81-I

Before SEYMOUR, HENRY and O'BRIEN, Circuit Judges.

## OPINION

SEYMOUR, Circuit Judge.

Zuni Public School District 89 (Zuni) and Gallup-McKinley County Public School District No. 1 (Gallup-McKinley) seek review of a final decision of the Secretary of Education which addressed whether, and to what extent, the State of New Mexico can consider its receipt of federal Impact Aid when making its own statewide distributions of educational funds. Both Zuni and Gallup-McKinley filed timely petitions for review of the Secretary's decision. We exercise jurisdiction pursuant to 20 U.S.C. § 7711(b)(1) and affirm.

### I

In October 1999, Zuni filed an objection to a certification made by the Department of Education that the State of New Mexico was equalized pursuant to 20 U.S.C. § 7709(b) and the corresponding regulations at 34 C.F.R. § 222.162.[1] This

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[1] In outlining the general parameters for determining whether a state is equalized, 20 U.S.C. § 7709(b)(2) provides:

> (A) . . . [A] program of State aid equalizes expenditures among local educational agencies if, in the second fiscal year preceding the fiscal year for which the determination is made, the amount of per-pupil expenditures made by . . . the local educational agency in the State with the highest such per-pupil expenditures or revenues did not exceed the amount of such per-pupil expenditures made by . . . the local educational agency in the State with the lowest such expenditures or revenues by more than 25 percent. (B) . . . In making a determination under this subsection, the Secretary shall-- (i) disregard local

certification allows New Mexico to offset its contributions to local education agencies (LEAs),[2] including Zuni and Gallup-McKinley, by a proportion of the federal Impact Aid payments made to those LEAs. *See* 20 U.S.C. § 7702, 7703, 7709(d)(1)(B). In November 1999, Gallup-McKinley filed a similar objection with the Department, alleging that New Mexico took an inappropriate proportion of Impact Act funds

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> educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State; and (ii) take into account the extent to which a program of State aid reflects the additional cost of providing free public education in particular types of local educational agencies, such as those that are geographically isolated, or to particular types of students, such as children with disabilities.

20 U.S.C. § 7709(b)(2). The corresponding regulation uses similar language.

> The Secretary considers that a State aid program equalizes expenditures if the disparity in the amount of current expenditures or revenues per pupil for free public education among LEAs in the State is no more than 25 percent. In determining the disparity percentage, the Secretary disregards LEAs with per pupil expenditures or revenues above the 95th or below the 5th percentile of those expenditures or revenues in the State. The method for calculating the percentage of disparity in a State is in the appendix to this subpart.

34 C.F.R. § 222.162(a).

[2] In New Mexico, local educational agencies (LEAs) are called school districts.

into consideration when determining state aid, in violation of 20 U.S.C. § 7709(d)(1) and 34 C.F.R. § 222.163(a).[3]

The objections of Zuni and Gallup-McKinley were consolidated for the purposes of administrative adjudication. An administrative law judge (ALJ) issued a decision sustaining the Department's certification and rejected all other arguments presented by Zuni and Gallup-McKinley. Both school districts appealed the ALJ's decision to the Secretary, who affirmed the ALJ's decision. We will discuss as necessary any additional relevant facts throughout the course of this opinion.[4]

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[3] Section 7709(d)(1) states:

> If a State has in effect a program of State aid for free public education in any fiscal year, which is designed to equalize expenditures for free public education among the local educational agencies of that State, payments under this subchapter for any fiscal year may be taken into consideration by such State in determining the relative - (A) financial resources available to local educational agencies in that State; and (B) financial need of such agencies for the provision of free public education for children served by such agency, except that a State may consider as local resources funds received under this subchapter only in proportion to the share that local tax revenues covered under a State equalization program are of total local tax revenues.

20 U.S.C. § 7709(d)(1). The regulation re-articulates the statutory directive and also indicates that "[d]eterminations of proportionality must be made on a case-by-case basis for each LEA affected and not on the basis of a general rule to be applied throughout a State." 34 C.F.R. § 222.163(a).

[4] Due to its interest in this controversy, the State of New Mexico was permitted by the ALJ to intervene below. Likewise, this court

## II

Zuni frames its challenge on appeal as "whether the United States Department of Education and State of New Mexico applied the mandatory statutory formula for determining whether a state has an equalized funding system for its schools which would entitle the state to take credit for federal Impact Aid funding." Aplt. br. at 2. As we will detail below, the Secretary determined the State of New Mexico was equalized under 20 U.S.C. § 7709, and reached this decision by reference to and application of the implementing regulations and appendix supporting the statute. *See* 34 C.F.R. § 222.162(a); 34 C.F.R. pt. 222, subpt. K, app. Thus, we must determine

> whether the text of the statute resolves the issue, or if not, whether the [Department's] interpretation [as evidenced by its application of the regulatory index] is permissible in light of the deference to be accorded to the agency under the statutory scheme. If the statute speaks clearly to the precise question at issue, we must give effect to the unambiguously expressed intent of Congress. If the statute is instead silent or ambiguous with respect to the specific issue, we must sustain the agency's interpretation if it is based on a permissible construction of the statute.

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granted New Mexico's motion to intervene as a party in this case on appeal. However, we deny New Mexico's October 30, 2003, motion to supplement the record with a supplemental appendix adding material that was not before the administrative agency.

*Yellow Transp., Inc. v. Michigan*, 537 U.S. 36, 45, 154 L. Ed. 2d 377, 123 S. Ct. 371 (2002) (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984); *Barnhart v. Walton*, 535 U.S. 212, 217-18, 152 L. Ed. 2d 330, 122 S. Ct. 1265 (2002)). In so doing, it is important for us to examine the current statute as well as its implementing regulations and appendix, and the history accompanying each.

Impact Aid is compensatory financial assistance paid by the United States to an LEA experiencing financial burdens because the LEA's ability to raise local revenues has been limited as a result of the real property within its boundaries having tax exempt status due to the property's acquisition by the federal government, or because the LEA educates children residing on, or whose parents are employed on federal property, including Indian lands. *See* 20 U.S.C. §§ 7701-7714.

Generally, states are prohibited from reducing the state aid they provide to their LEAs if the LEAs receive Impact Aid. *See* 20 U.S.C. § 7709(a). Pursuant to 20 U.S.C. § 7709(b), however, if a state is certified by the Department as having a program of state aid "that equalizes expenditures for free public education among local educational agencies in the State," *id.*, then the state is permitted to factor in the receipt of Impact Aid funds when making its own distributions of educational aid to its LEAs. The statute sets out a general disparity test to determine whether a state is equalized. Under this test, LEAs are ranked in descending order by their per-pupil expenditures or revenues. If the LEA that is ranked highest in terms of its per-pupil expenditures or revenues does not exceed the per-pupil revenues or expenditures of the lowest ranked LEA by more than twenty-five percent, then

the state qualifies as equalized under the statute. 20 U.S.C. § 7709(b)(2)(A).

In making this calculation, LEAs ranked at the extremes with the highest and lowest per-pupil expenditures are excluded. As directed by the statute, "local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State," 20 U.S.C. § 7709(b)(2)(B)(i), are disregarded when determining whether a twenty-five percent disparity exists between the highest and lowest LEAs.

The exception detailed in 20 U.S.C. § 7709(b) allowing "equalized" states to take into consideration Impact Aid when making their own distributions of state aid first appeared in the Impact Aid laws in 1974. That statute used general language similar to that which appears in the current statute,[5] but instead of describing a disparity test, the 1974 statute expressly delegated to the Secretary the power to define the term "equalize expenditures." *See* 20 U.S.C. § 240(d)(2)(B) (1982).

In 1976, after engaging in the process of notice and comment rulemaking, the Secretary promulgated regulations in which it outlined the disparity test. It directed that a state would be deemed equalized if "the disparity in the amount of current expenditures or revenue per pupil for free public

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[5] *See* 20 U.S.C. § 240(d) (1982) (repealed by Pub.L. 103-182, Title III, § 333(b), Oct. 20, 1994, 108 Stat. 3965) ("[I]f a State has in effect a program of State aid for free public education for any fiscal year, which is designed to equalize expenditures for free public education among the local educational agencies of that State," Impact Aid payments may be taken into account.).

education among local educational agencies having similar grade levels in the State is no more than 25 per centum, as determined according to the procedures set forth in Appendix A to this subpart." 41 Fed. Reg. 26320, 26327 (June 25, 1976). Appendix A detailed the specific method by which to make the disparity determination. First, LEAs were ranked by expenditures or revenues per pupil, and then those LEAs which fell "at the 95th and 5th percentiles of the total numbers of pupils in attendance in the schools of those agencies," were eliminated. *Id.* at 26329. The twenty-five percent disparity comparison was then made between the remaining highest and lowest ranked LEAs. *Id.*

In the course of the 1976 notice and comment process, the Department of Education responded in length to a question regarding whether the ninety-fifth and fifth percentiles were to be calculated based on the total number of pupils in the state or by school districts. It stated that

> *the referenced percentiles are based on number of pupils*. [The regulation] provides that in calculating the disparity standard according to the procedures set forth in Appendix A, the districts in a State will be ranked on the basis of current expenditures or revenue per pupil, and that those districts which fall above the 95th and below the 5th percentile of those agencies in terms of the number of pupils in attendance in the schools of those agencies will be excluded for purposes of the calculation. *The percentiles will be determined on the basis of numbers of pupils and not on the basis of numbers of school districts.* However, it appears that the proposed regulation may not have been as clearly expressed as desired. In regard to the question of pupils versus districts for the percentages used in calculating the disparity standard, it is the

> Commissioner's view that basing an exclusion on numbers of districts would act to apply the disparity standard in an unfair and inconsistent manner among States. The purpose of the exclusion is to eliminate those anomalous characteristics of a distribution of expenditures. In States with a small number of large districts, an exclusion based on percentage of school districts might exclude from the measure of disparity a substantial percentage of the pupil population in those States. Conversely, in States with large numbers of small districts, such an approach might exclude only an insignificant fraction of the pupil population and would not exclude anomalous characteristics.

*Id.* at 26324 (emphasis added). In 1993, the 1976 regulations and the accompanying appendix were codified with substantially the same language in the Code of Federal Regulations. *See* 34 C.F.R. § 222.63 (1993), 34 C.F.R. pt. 222, subpt. K, app. (1993).

In 1994, the statute at issue in this case was passed, repealing and replacing 20 U.S.C. § 240(d). As noted above, the replacement statute, 20 U.S.C. § 7709, specifically details within its text the twenty-five percent disparity test, and also includes language setting out the basic parameters of the required ninety-fifth and fifth percentile determinations. This statutory language largely reiterates the disparity test and percentile determinations laid out in the earlier regulations and appendix. However, the percentile language appearing in the 1994 statute differs slightly from that which appeared in the earlier regulations. While the former appendix directed that the ninety-fifth and fifth percentiles should be calculated by "the total number of pupils in attendance in the schools" to determine which LEAs to eliminate, 34 C.F.R. pt. 222, subpt. K, app. (1993), the 1994 statute dictates that LEAs

"with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State," 20 U.S.C. § 7709(b)(2)(B)(i), should be disregarded. Nothing in the legislative history for the 1994 changes to the law gives any indication as to what meaning, if any, should be ascribed to the language "above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State," *id.*, when calculating whether a state is equalized. At most, the legislative history merely notes that the statute "prohibits a State from taking Impact Aid payments into account in determining the amount of State aid to be paid to LEAs that receive Impact Aid, unless that State has an equalization plan approved by the Secretary and describes the standard which State plans must meet." H.R. NO. 103-425, at 71 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2807, 2877.

Following the passage of 20 U.S.C. § 7709, the Department enacted new regulations to replace the 1976 regulations. The new disparity calculation regulation closely mirrors the language of the statute:

> The Secretary considers that a State aid program equalizes expenditures if the disparity in the amount of current expenditures or revenues per pupil for free public education among LEAs in the State is no more than 25 percent. In determining the disparity percentage, the Secretary disregards LEAs with per pupil expenditures or revenues above the 95th or below the 5th percentile of those expenditures or revenues in the State.

34 C.F.R. § 222.162(a). But the regulation goes on to state, in a fashion similar to its predecessors, that "the method for calculating the percentage disparity in a State is in the appendix to this subpart." *Id.* The appendix, 34 C.F.R. pt.

222, subpt. K, app., contains the same per-pupil expenditure percentile ranking method as was outlined in the earlier appendices, and details the same specific methodology for calculating the twenty-five percent disparity test. It directs as follows:

> (a) The determinations of disparity in current expenditures or revenue per pupil are made by --
> (i) Ranking all LEAs having similar grade levels within the State on the basis of current expenditures or revenue per pupil for the second preceding year before the year of determination;
> (ii) Identifying those LEAs in each ranking that fall at the 95th and 5th percentiles *of the total number of pupils in attendance in the schools of those LEAs*; and
> (iii) Subtracting the lower current expenditure or revenue per pupil figure from the higher for those agencies identified in paragraph (ii) and dividing the difference by the lower figure.

*Id.* (emphasis added). The history accompanying the regulation notes that the regulation outlines the single statutory standard for determining whether a state is equalized and "specifies the method the Secretary will employ to measure the statutory disparity standard. Detailed examples of the application of this method to State funding programs are provided in the Appendix following subpart K." 60 Fed. Reg. 50774, 50777 (September 29, 1995).[6] In sum, the

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[6] In 1996, after the Department's promulgation of the Impact Aid regulations, Congress revisited the Impact Aid laws "to make clarifying and technical amendments with respect to the Impact Aid program and to address problems related to Impact Aid payments which have national application." H.R. NO. 104-560, at 1 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2894, 2894. None of the concerns

Department has adhered since 1976 to a rule which dictates that when disregarding LEAs to determine whether a state is equalized, the ninety-fifth and fifth percentiles should be calculated by the total number of students in the state, rather than by the number of LEAs.

With this history in place, we turn to an examination of the Department's percentile calculation to determine whether the Department's construction is permissible in light of the language in 20 U.S.C. § 7709 which directs that "local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State," should be disregarded. 20 U.S.C. § 7709(b)(2)(B)(I).

In determining whether New Mexico qualified in the year in question here as an equalized state under 20 U.S.C. § 7709, the Department followed the methodology provided in the appendix to 34 C.F.R. § 222.162 to decide which LEAs fell within the ninety-fifth and fifth percentiles of "the total number of pupils in attendance in the schools of those LEAs." 34 C.F.R. pt 222, subpt. K, app. Applying this methodology to New Mexico, which has predominately small LEAs among its eighty-nine public LEAs, the Department eliminated the eighteen highest-ranked and the seven lowest-ranked LEAs before ascertaining that the newly-top-ranked LEA received only 14.43% more state funding than the newly-bottom-ranked LEA. The Department thus concluded that New Mexico's public school funding is substantially equalized.

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raised or amendments made in the 1996 changes to the Impact Aid law addressed in any manner the disparity test outlined in 20 U.S.C. § 7709 or the regulations promulgated to support it.

Zuni argues that this methodology directly conflicts with the statutory language of 20 U.S.C. § 7709(b)(2)(B)(i), which it reads to require the Department to eliminate LEAs on the basis of LEA percentiles rather than by student population percentiles. It asserts that the statute requires one of only two methods for determining the ninety-fifth and fifth percentiles of per-pupil expenditures: (1) eliminate five percent of the LEAs at the top and bottom of the ranked chart of LEAs, or (2) figure five percent of the highest and lowest actual per-pupil expenditure figures and disregard those LEAs that are funded above and below those numbers, respectively.[7] Zuni asserts the total number of students is irrelevant to determining percentiles of per-pupil expenditures and thus conflicts with the statute. We disagree.

Where a law entrusted to an agency's administration is ambiguous, or where Congress implicitly or explicitly left a gap in the law to be filled in by the agency through the formulation of policy or rules, "we must accept the agency's position so long as it reflects a permissible construction of the language in question." *Hill v. Ibarra*, 954 F.2d 1516, 1523 (10th Cir. 1992) (quotation omitted). *See also Chevron*, 467 U.S. at 842-43. "Such an interpretation is given controlling weight unless it is arbitrary, capricious, or contrary to law." *McNamar v. Apfel*, 172 F.3d 764, 766 (10th Cir. 1999).

When Congress passed 20 U.S.C. § 7709 in 1994, it codified the disparity standard essentially as it appeared in the

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[7] Under Zuni's first proffered method, Zuni eliminated the top five and bottom five LEAs and then calculated the disparity between the newly top and bottom ranked LEAs at 26.93%. *See* Aplt. br. at 12, n.1. Under its second method, Zuni calculated the disparity between the highest and lowest ranked LEAs at 117.4%. *Id.* at 13, n.2.

former regulations, albeit with an unexplained and slight alteration to the wording regarding percentile exclusions. *Compare* 34 C.F.R. § 222.63 (1993) *and* 34 C.F.R. pt. 222, subpt. K, app. (1993) *with* 20 U.S.C. § 7709(b). While the prior statutory scheme and regulations made clear that the percentiles were to be calculated by total student population, the new statutory language is not as explicit: the precise language directs the Secretary to "disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile of *such [per pupil] expenditures in the State*". 20 U.S.C. § 7709(b)(2)(B)(i) (emphasis added). We agree with the Secretary's determination that the statute is ambiguous:

> [a]lthough the impact aid statute sets forth the parameters for calculating state public education expenditures or revenues under the disparity test, the statute does not contain a specific implementation of the disparity test; instead, Congress left that gap to be filled by regulation, which has been duly promulgated at an appendix to subpart K of 34 CFR Part 222.

Rec., vol. III, doc. 25 at 3. In other words, we do not know what calculations Congress intended by "such [per pupil] expenditures in the State." Even Zuni conceded in its argument before the ALJ that the statute "may be ambiguous [as] to the precise formula that is to be used." *Id.*, doc. 16 at 10. The statute's ambiguity,[8] coupled with the gap left by Congress regarding the specific means by which to implement the disparity test, requires us, in accordance with the well-

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[8] This ambiguity is highlighted by Zuni's own proffer of two different approaches for making the disparity calculation, which result in different outcomes. *See infra* note 6.

established rule laid out in *Chevron*, to give deference to the Secretary's interpretation of the statute if we deem that interpretation to be reasonable or "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. Based on our review of the statute, the regulations and the history accompanying both, we cannot hold that the Department's construction of the statute and the method by which it applied the disparity test was impermissible.

The statute mandates that the expenditures or revenue for each LEA be calculated on a per pupil basis. *See* 20 U.S.C. § 7709(b)(2)(B)(i). The statute then directs that those LEAs which fall above the ninety-fifth percentile or below the fifth percentile of "such [per-pupil] expenditures or revenues in the state" should be disregarded for the purpose of calculating the disparity standard. *Id.* Because the statute mandates that expenditures or revenues be examined on a per-pupil basis, we conclude the Department's method of determining the ninety-fifth and fifth percentiles based on the total student enrollment in the state is a permissible construction. Having already ranked the LEAs in descending order by their per-pupil expenditures, it makes sense that the cut-off points for percentiles would also be based on total student enrollment. Such an approach supports the basic purpose of the percentile exclusion because it eliminates in a fair and effective manner any unusual or noncharacteristic per-pupil revenues or expenditures that may appear at the extremes of the range of LEAs in the state. This is especially true for the State of New Mexico, which has predominately small LEAs, several of which rank near the top of per-pupil expenditures. *See* Rec., vol. I, doc. 4, attach. 4 at 1. To base the percentile calculation on LEAs, rather than student population, would not further the goal of eliminating this unusual distribution of per-pupil expenditures in New Mexico. As we previously

pointed out, the Department rejected determining percentiles solely on an LEA basis for this very reason.

> [B]asing an exclusion on numbers of districts would act to apply the disparity standard in an unfair and inconsistent manner among States. The purpose of the exclusion is to eliminate those anomalous characteristics of a distribution of expenditures. In States with a small number of large districts, an exclusion based on percentage of school districts might exclude from the measure of disparity a substantial percentage of the pupil population in those States. Conversely, in States with large numbers of small districts, such an approach might exclude only an insignificant fraction of the pupil population and would not exclude anomalous characteristics.

41 Fed. Reg. 26324 (June 25, 1976). Finally, as detailed above, the Department's method of calculating percentiles by student population comports with the longstanding history surrounding such calculations.

There may exist some other, and perhaps even better, way to eliminate anomalies in school district funding in New Mexico. However, given the large number of small LEAs in the state, the Department's disparity calculation methodology implements the statute in a manner that will give a more consistent result when applied to a variety of state school systems. We need not conclude the "agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading [we] would have reached if the question initially had risen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11. Rather, we are compelled to "sustain the agency's determination if it is based on a permissible construction of the statute." *Yellow Transp., Inc.*,

537 U.S. at 45 (quotation omitted). Based on our analysis above, we hold that the Department's construction of 20 U.S.C. § 7709(b)(2)(B)(i), through its application of the disparity calculation methodology laid out in 34 C.F.R. § 222.162(a) and its accompanying appendix, is permissible, and therefore warrants our deference under *Chevron*.

## III

We turn next to Gallup-McKinley's argument challenging New Mexico's offset of contributions to LEAs. We decline to devote any substantial analysis to the merits of Gallup-McKinley's contention because we conclude it failed to raise this issue in a sufficient manner before the agency below.

Congress limits state offsets for federal Impact Aid funding to a "proportion to the share that local tax revenues covered under a State equalization program are of total local tax revenues." 20 U.S.C. § 7709(d)(1)(B). The corresponding regulation provides, in part, that "determinations of proportionality must be made on a case-by-case basis for each LEA affected and not on the basis of a general rule to be applied throughout a State." 34 C.F.R. § 222.163(a). On appeal, Gallup-McKinley complains that, in violation of the regulatory language requiring the state to determine proportionality on a "case-by-case" basis, New Mexico applies an across-the-board standard to its school districts. Gallup-McKinley contends it raised this specific issue during oral arguments before the ALJ.

In the course of the proceedings below, Gallup-McKinley outlined three different methods by which it believed the proportional Impact Aid offset should be calculated. One of these methods was admittedly presented to the ALJ for the first time during oral arguments. Rec., vol. III, doc. 16 at 86-

87. In that argument, Gallup-McKinley asserted a method of determining proportionality that conflicted with New Mexico's method. It was only at the very close of oral argument that Gallup-McKinley made the most general of references to the regulation's "case-by-case" language. *Id.* at 111-12. But Gallup-McKinley did not present any argument to the ALJ, either during the course of oral argument or in any of its initial written submissions to the judge, to explain why the State of New Mexico's proportionality calculation allegedly violated the "case-by-case" language appearing in 34 C.F.R. § 222.163(a) while its suggested method did not. The ALJ asked the parties to include in their supplemental briefs a discussion of whether Gallup-McKinley's additional method fell within the regulations. *Id.* at 102.

In their supplemental briefs to the ALJ, the State of New Mexico and Department of Education appropriately focused their arguments on whether Gallup-McKinley's newly proffered proportionality offset method fit within the regulations. Gallup-McKinley did the same, claiming in conclusory fashion and without any substantial discussion, argument, or analysis, that the regulation's "case-by-case" language was violated by New Mexico's method. It never offered any explanation as to why its suggested proportionality formula met the "case-by-case" requirement while New Mexico's did not, *id.*, doc. 17 at 4, and it still offers no such explanation in its appeal brief to us.

In its opinion, the ALJ considered Gallup-McKinley's three different interpretations of how 20 U.S.C. § 7709(d)(1) should be applied in light of the general proportionality issues timely and sufficiently presented to it, and rejected each as inconsistent with the statute and its corresponding regulation. *Id.*, doc. 21 at 8-10. It did not mention the "case-by-case" language of the regulation. In seeking review of the ALJ's

decision to the Secretary of Education, Gallup-McKinley reframed its challenge against the State of New Mexico's proportionality offset determination, and stated the "sole issue" on appeal was "whether determinations of proportionality must be made on a case-by-case basis for each LEA or if it can be based upon a general rule applied throughout the State." *Id.*, doc. 23 at 2. In addressing Gallup-McKinley's appeal, the Secretary limited its analysis to the more general proportionality issues that were presented to the ALJ, and did not devote any discussion to Gallup-McKinley's new and undeveloped "case-by-case" argument. *Id.*, doc. 25 at 2 n.3.

It is well established that "in the absence of exceptional circumstances, a reviewing court will refuse to consider contentions not presented before the administrative proceeding at the appropriate time." *Micheli v. Director, OWCP*, 846 F.2d 632, 635 (10th Cir. 1988) (quoting *Duncanson-Harrelson Co. v. Director, OWCP*, 644 F.2d 827, 832 (9th Cir. 1981) (further quotation omitted)). Likewise,

> [v]ague, arguable references to [a] point in the [lower] court proceedings do not . . . preserve the issue on appeal. [W]here a litigant changes to a new theory on appeal that falls under the same general category as an argument present at trial or presents a theory that was discussed in a vague and ambiguous way the theory will not be considered on appeal.

*Bancamerica Commercial Corp. v. Mosher Steel of Kansas, Inc.*, 100 F.3d 792, 798-99 (10th Cir. 1996) (citations and quotations omitted). Hence, when a litigant fails to raise an issue below in a timely and clear fashion and the lower court does not address the merits of the issue, the issue is not

preserved for our review. *FDIC v. Noel*, 177 F.3d 911, 915 (10th Cir. 1999).

Based on our review of the record, Gallup-McKinley's passing and conclusory references to 34 C.F.R. § 222.163(a)'s "case-by-case" language during oral argument and in its supplemental briefs to the ALJ are, at best, ambiguous and vague. As a result, neither the ALJ nor the Secretary addressed the merits of this potential argument. We therefore conclude that Gallup-McKinley failed to preserve this issue for appeal, and we decline to address it.

The petition for review is **DENIED**.

**O'BRIEN**, dissenting.

The federal government makes payments for the benefit of local education agencies (LEAs) to ameliorate costs incurred in educating federally connected children. Such children include those residing on Indian lands. 20 U.S.C. § 7703(a)(1)(C). Quite reasonably, Congress wants the impact aid payments to be applied for the intended (and expressed) purpose, not merely used as a federal supplement for a state's general education needs. But the matter is complicated because some states have equalized education spending, taking money from wealthy LEAs to meet the needs of children in less fortunate ones. In truly equalized states the special costs of educating federally connected children are borne system-wide, rather than by the LEAs where those children reside. Congress recognized the complication and dealt with it quite specifically in the statutes. That is the backdrop for and focus of this litigation.

Plaintiff school districts contend that New Mexico has not equalized education spending and therefore cannot count

impact aid for LEAs as a local resource.[9] They are correct. Because the majority's decision defies express statutory language, I respectfully dissent.

The relevant statute, 20 U.S.C. § 7709, prohibits a state from counting federal Impact Aid payments as a resource in determining the amount of state aid to be allocated to that LEA for free public education.[10] But there is an exception for a state with "a program . . . that equalizes expenditures for free public education among local educational agencies in the State." 20 U.S.C. § 7709(b)(1). A state's educational spending is equalized--

> if, in the second fiscal year preceding the fiscal year for which the determination is made, the amount of per-pupil expenditures made by, or per-pupil revenues available to, the *local educational agency* in the State with the highest such per-pupil expenditures or revenues did not exceed the amount of such per-pupil

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[9] When impact aid is counted as part of an LEA's local resources it reduces the amount of state aid to the LEA.

[10] 20 U.S.C. § 7709(a) General prohibition Except as provided in subsection (b) of this section, a State may not--

**(1)** consider payments under this subchapter in determining for any fiscal year--

**(A)** the eligibility of a local educational agency for State aid for free public education; or

**(B)** the amount of such aid; or

**(2)** make such aid available to local educational agencies in a manner that results in less State aid to any local educational agency that is eligible for such payment than such agency would receive if such agency were not so eligible.

> expenditures made by, or per-pupil revenues available to, the *local educational agency* in the State with the lowest such expenditures or revenues by more than 25 percent.

20 U.S.C. § 7709(b)(2)(A) (emphasis added). In making that determination Congress directed the Secretary to "disregard *local educational agencies* [LEAs] with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State" as part of its equalization determination. 20 U.S.C. § 7709(b)(2)(B)(i) (emphasis added); *see also* 20 U.S.C. §§ 7702, 7703 and 7709(b)(1).

These requirements are unambiguous. A percentile is a mathematical concept not admitting of multiple interpretations; it is a simple, straightforward method of ranking an array of values. Attached to this dissent is Exhibit A. It lists all of the 89 New Mexico LEAs along with the per-pupil revenue for each.[11] Analysis of that array yields a value of $3,650.40 for the 95th percentile and $2,803.80 for the 5th percentile. Five districts are above the 95th percentile and five districts fall below the 5th percentile; they are excluded from further analysis. After the exclusion, Gadsden district has the lowest per-pupil revenues ($2,829.00). When those revenues are multiplied by 125% the result is $3,536.00, an amount less than the highest non-excluded district, Maxwell--

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[11] It uses the 1999-2000 data supplied by the parties and was produced using Microsoft's "Excel" spreadsheet program. Once the districts and per-pupil spending were listed the program's percentile function (=PERCENTILE ([first cell-Moscero district]:[last cell-Des Moines district],0.95) was applied to the array and returned the numbers for the 95th percentile and 5th percentile. No manipulation or massaging of the data was necessary.

with per-pupil revenues of $3,591.00. The 25% test is not met. New Mexico has not equalized school funding as statutorily required, therefore federal impact aid cannot be counted as part of the LEAs' resources.

Eschewing a plain and simple reading of the statute, the Department of Education has adopted regulations which it and, derivatively, the State of New Mexico used to determine whether New Mexico has an equalized educational funding system. The regulations essentially contradict and undermine the provisions of the statute that authorizes them, 20 U.S.C. § 7709.[12]

Rather than abide the statutory command to apply a mathematical function to an array of numbers, the Department adopted regulations directing a complex and mystifying formula for determining which LEA's fall into the 5th and 95th percentiles of per-pupil expenditures. 34 C.F.R. 222.162, *et. seq*. The regulations start correctly by requiring LEAs to be arrayed according to their per-pupil expenditures (or revenues). Next, and inexplicably, they require a calculation of 5 percent of the total number of pupils in the state. The number of LEAs necessary to use up 5% of the *state's student population* at both ends of the list are eliminated from consideration in applying the 25% formula. Then the per-pupil expenditures of the highest and lowest

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[12] The Department ignored 1994 statutory changes, clinging instead to contrary past practices. See Majority Op. at 11-13. It now argues, and the majority accepts, that its historical practice of using "pupils in attendance in the schools of those agencies" is congruent with the statutory language "per-pupil expenditures or revenues." As Justice Scalia said in a different context, "they are as similar as chalk and cheese." *Blakely v. Washington*, 159 L. Ed. 2d 403, 124 S. Ct. 2531, 2537 (2004).

remaining LEAs are used to determine whether there is less than a 25% disparity in funding and, therefore, "equalization." That seems quite at odds with the statute's directive to disregard LEAs "with per-pupil *expenditures or revenues* above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State." I cannot join the majority in putting the Court's imprimatur on an unwieldy scheme utterly at odds with clear statutory language.

Review of this regulatory framework begins and ends with *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). In reviewing an agency's construction of a statute it administers, we must first ask whether Congress has directly spoken on the precise question at issue. If the statute is silent or ambiguous, the inquiry is whether the agency's interpretation is a permissible construction of the statute. *Id.* at 842-43. However, when the statute is clear and unambiguous, further "interpretation" is not only unnecessary, it is prohibited. *Id.; see also Regions Hosp. v. Shalala*, 522 U.S. 448, 457, 139 L. Ed. 2d 895, 118 S. Ct. 909 (1998). Unlike the majority, I am not convinced we need to look beyond the statute to find the precise formula for measuring equalization.

Statutes should be read to avoid rather than beget ambiguity. Here, § 7709 instructs the Secretary to "disregard LEAs with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State." The focus is upon LEAs, not upon the number of pupils. Moreover, Congress was concerned with ranking LEAs by expenditure (or resource) "percentiles," rather than by the number or percentage of students. The words Congress chose are not coincidental, nor are we

allowed to indulge in presumptions, despite our own personal predilections. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 117 L. Ed. 2d 391, 112 S. Ct. 1146 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.") (citations omitted).[13]

The Department's approach not only undermines the plain language of the statue, but also its purpose. "There is . . . no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543, 84 L. Ed. 1345, 60 S. Ct. 1059 (1940). The stated purpose in providing Impact Aid is to "fulfill the Federal responsibility to assist with the provision of educational services to federally connected children in a manner that *promotes control by local educational agencies with little or no Federal or State involvement*." 20 U.S.C. § 7701 (emphasis added). Focusing on the needs of individual LEAs rather than on the entire state school population also flows into the understanding of § 7709, for its focus is on examining "the amount of per-pupil expenditures made by, or per-pupil revenues available to, *the local educational agency* in the State . . . ." 20 U.S.C. § 7709(b)(2)(A) (emphasis added).

In support of its conclusion that the statute is ambiguous, the majority emphasizes 1994 events saying that Congress codified the disparity standard in 20 U.S.C. § 7709 "essentially as it appeared in the former regulations," which

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[13] The subsection's title "Computation," 20 U.S.C. § 7709(b)(2), suggests that Congress had a particular formula in mind, the one it adopted.

allowed for the percentile calculation to be based on the total student enrollment in the state. Majority Op. at 15. The statement might be persuasive if it were not manifestly untrue. The entire basis for this case is the difference in language between the 1994 statute, which by its terms does not allow for a population based calculation, and the pre-existing regulations that expressly did. If Congress had adopted a standard that was "essentially" the same as the pre-existing regulations, it would not have altered the language of the statute to require that the calculation be based on per-pupil expenditures or revenues of "local educational agencies." While the majority may consider such a difference an "unexplained and slight alteration," such a conclusion ignores the strong presumption that Congress chooses its words carefully and with full knowledge of administrative interpretations. "Congress is presumed to be aware of an administrative . . . interpretation of a statute and to adopt that interpretation when it re-enacts a statute *without change*." *Lorillard v. Pons*, 434 U.S. 575, 55 L. Ed. 2d 40, 98 S. Ct. 866 (1978) (emphasis added).[14] The fact that Congress adopted a disparity standard different from the clearly articulated pre-existing regulations is evidence that Congress rejected, rather than adopted, the total student enrollment standard.

The majority observes, "There may exist some other, and perhaps even better, way to eliminate anomalies in school district funding in New Mexico." Maj. Op. at 18.

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[14] "This selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices strongly suggests that *but for those changes Congress expressly made*, it intended to incorporate fully the remedies and procedures of the FLSA". *Id.* at 582 (emphasis added).

Nevertheless it concludes the Department's construction is a permissible one. I posit that the Department's method of handling the 5th/95th percentile exclusion may be the superior one, but it is not the one ordained by Congress.

# EXHIBIT A
# JUDGE O'BRIEN'S DISSENT

Impact Aid Disparity for 1999-2000

| District | Revenue/ Member |
|---|---|
| 1 Mosquero | $6,520.00 |
| 2 Corona | $5,791.00 |
| 3 Los Alamos | $5,611.00 |
| 4 Vaughn | $4,641.00 |
| 5 Hondo Valley | $3,690.00 |
| 1st district ABOVE 95th Percentile | |
| $3,650.40 = 95th Percentile | |
| 6 Maxwell | $3,591.00 |
| 7 Mora | $3,530.00 |
| 8 Roy | $3,516.00 |
| 9 Logan | $3,484.00 |
| 10 Cuba | $3,404.00 |
| 11 Silver City | $3,391.00 |
| 12 Texico | $3,335.00 |
| 13 Zuni | $3,320.00 |
| 14 Springer | $3,295.00 |
| 15 Jemez Valley | $3,286.00 |
| 16 Ruidoso | $3,278.00 |
| 17 Tatum | $3,266.00 |
| 18 Penasco | $3,259.00 |
| 19 Raton | $3,249.00 |
| 20 Tularosa | $3,246.00 |
| 21 Bernalillo | $3,244.00 |
| 22 Las Vegas West | $3,241.00 |
| 23 Mesa Vista | $3,233.00 |
| 24 Hatch | $3,206.00 |
| 25 Loving | $3,204.00 |
| 26 Mountainair | $3,195.00 |
| 27 Cobre | $3,194.00 |

| District | Revenue/ Member |
|---|---|
| 28 Melrose | $3,187.00 |
| 29 Taos | $3,164.00 |
| 30 Pojoaque | $3,155.00 |
| 31 Wagon Mound | $3,154.00 |
| 32 Carlsbad | $3,152.00 |
| 33 Clayton | $3,151.00 |
| 34 Espanola | $3,147.00 |
| 35 Jemez Mountain | $3,123.00 |
| 36 Las Vegas City | $3,122.00 |
| 37 Ft. Sumner | $3,100.00 |
| 38 Magdalena | $3,092.00 |
| 39 Jal | $3,091.00 |
| 40 Cimarr n | $3,088.00 |
| 41 Reserve | $3,087.00 |
| 42 Lordsburg | $3,074.00 |
| 43 Albuquerque | $3,071.00 |
| 44 Chama | $3,065.00 |
| 45 San Jon | $3,059.00 |
| 46 Questa | $3,054.00 |
| 47 Santa Fe | $3,050.00 |
| 48 Grants | $3,035.00 |
| 49 Pecos | $3,033.00 |
| 50 Central | $3,027.00 |
| 51 Santa Rosa | $3,011.00 |
| 52 Elida | $3,006.00 |
| 53 Estancia | $3,002.00 |
| 54 Dora | $2,996.00 |
| 55 Roswell | $2,992.00 |
| 56 Clovis | $2,983.00 |
| 57 Alamogordo | $2,982.00 |
| 58 Tucumcari | $2,975.00 |
| 59 Animas | $2,975.00 |
| 60 Portales | $2,975.00 |

| District | Revenue/ Member |
|---|---|
| 61 Las Cruces | $2,974.00 |
| 62 Socorro | $2,968.00 |
| 63 Bloomfield | $2,968.00 |
| 64 Artesia | $2,964.00 |
| 65 Lovington | $2,963.00 |
| 66 Capitan | $2,962.00 |
| 67 Rio Rancho | $2,959.00 |
| 68 Belen | $2,948.00 |
| 69 Farmington | $2,948.00 |
| 70 Truth or Cons. | $2,945.00 |
| 71 Aztec | $2,942.00 |
| 72 House | $2,936.00 |
| 73 Grady | $2,915.00 |
| 74 Deming | $2,912.00 |
| 75 Los Lunas | $2,887.00 |
| 76 Cloudcroft | $2,884.00 |
| 77 Dexter | $2,883.00 |
| 78 Carrizozo | $2,880.00 |
| 79 Moriarty | $2,870.00 |
| 80 Gallup | $2,861.00 |
| 81 Quemado | $2,858.00 |
| 82 Eunice | $2,849.00 |
| 83 Hobbs | $2,848.00 |
| 84 Gadsden | $2,829.99 |
| $2,803.80 = 5th Percentile | |
| 1st district below 5th Percentile | |
| 85 Lake Arturn | $2,787.00 |
| 86 Dulce | $2,783.00 |
| 87 Hagerman | $2,777.00 |
| 88 Floyd | $2,725.00 |
| 89 Des Moines | $2,672.00 |

| District | Revenue/ Member |
|---|---|
| Total | $284,095.00 |
| Mean | $3,192.08 |
| Median | $3,059.00 |
| 95th Percentile | $3,650.40 |
| 5th Percentile | $2,803.80 |

## APPENDIX C

**THE SECRETARY OF EDUCATION**
**WASHINGTON, DC 20202**

**Docket No. 99-81-I**

**[Filed October 11, 2001]**

| | |
|---|---|
| In the Matter of | ) |
| ZUNI PUBLIC SCHOOL | ) |
| DISTRICT #89 and | ) |
| GALLUP-McKINLEY | ) |
| PUBLIC SCHOOLS, | ) |
| | ) |
| Applicants. | ) |
| | ) |

**Impact Aid Proceeding**

## DECISION OF THE SECRETARY[15]

Zuni Public School District #89 (Applicant) is a local education agency (LEA) in the State of New Mexico seeking review of the April 17, 2001 Initial Decision of Chief Administrative Law Judge Allan C. Lewis (ALJ). The ALJ dismissed Applicant's challenge to a determination by the Assistant Secretary for Elementary and Secondary Education

[15] This decision serves as contemporaneous notice that the petitions requesting review of the Initial Decision have been granted.

(Assistant Secretary) regarding the Assistant Secretary's certification of the State's request, for the purpose of participation in the Federal Impact Aid Program, to calculate its expenditure of public education funds for fiscal year 1999 under an equalization standard pursuant to the Impact Aid Act, Pub. L. No. 81-874, 64 Stat. 1100 (20 U.S.C. §§ 236-244).[16]

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[16] The Impact Aid Act was repealed; see the Improving America's Schools Act of 1994, § 331 (b), Pub.L. No. 103-382, 108 Stat. 3518, 3965, and a new Impact Aid statute enacted, Title VIII, § 8001, 108 Stat. at 3749, codified at 20 U.S.C. §§ 7701-7714 (1994). As a consequence of those legislative judgments, the impact aid program is now governed by Title VIII of the Elementary and Secondary Education Act of 1965, as amended by the Improving America's School's Act of 1994.

The ALJ dismissed Applicant's[17] challenge after concluding that the outcome of the Assistant Secretary's determination was correct. For the reasons noted below, I affirm the ALJ's decision, and uphold the Assistant Secretary's certification for the State of New Mexico for fiscal 1999. Inasmuch as the ALJ's decision is unclear or ambiguous on an important question raised by the parties, this decision modifies – to the extent necessary – and clarifies the ALJ's decision as to why the impact aid regulations at issue control the outcome of this case, and are not in conflict with the impact aid statute.

The impact aid statute requires that a state participating in the federal impact aid program that calculates the state's share of expenditures for participation in the impact aid program by including federal impact aid funds m the state's share of expenditures for public education have in effect a program of

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[17] Gallup-McKinley Public Schools, an LEA, appeared before the ALJ raising its own challenges to the Assistant Secretary's determination on the basis of policy arguments; ostensibly arguing that New Mexico is using the equalization exception to transfer the State's own responsibility for funding public education to the federal government by way of the impact aid program. In support of its position, the LEA offers a number of alternative calculations to determine the proportional share of local tax revenues covered under the equalization program. The ALJ dismissed those challenges because they were inconsistent with the clear statutory mandate on proportionality. As the ALJ pointed out, it is apparent that the LEA is frustrated with the State's funding of public education over the previous two decades, but the LEA seeks a remedy that is far outside the scope of the limited and narrow purposes of impact aid funding. Upon my review, the ALJ's findings and determinations with regard to Gallup-McKinley Public Schools challenges are upheld.

aid that equalizes expenditures for free public education among its local educational agencies.[18] The ALJ agreed with the Assistant Secretary that New Mexico met the equalization standard for fiscal 1999. Applicant contends that the Assistant Secretary erred in concluding that the state met the equalization standard by using what is termed a "disparity test"[19] that is inconsistent with the impact aid statute. Although the impact aid statute sets forth the parameters for calculating state public education expenditures or revenues under the disparity test, the statute does not contain a specific implementation of the disparity test; instead, Congress left that gap to be filled by regulation, which has been duly promulgated at an appendix to Subpart K of 34 CFR Part 222.

In support of its petition, Applicant makes it clear that it does not seek to have the Initial Decision "overturn[ed]."

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[18] Under the Federal impact aid program, a school system or district may be eligible for Federal assistance due to the presence of the Federal government in the school district.

[19] The disparity test is a means to determine whether a State equalizes public school expenditures among its LEAs. Equalization is present–

> if, in the second fiscal year preceding the fiscal year for which the determination is made, the amount of per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the highest such per-pupil expenditures or revenues did not exceed the amount of such per-pupil expenditures made by or per-pupil revenues available to, the local educational agency in the State with the lowest such expenditures or revenues by more than twenty-five percent (25%).

20 U.S.C. § 7709(b)(2)(A).

Instead, applicant seeks review of a question the ALJ did not resolve; namely, a definitive statement that the Department's impact aid regulations contained in an appendix to Subpart K of 34 CFR Part 222 are "invalid."[20] Notably, Applicant points out that the record is replete with indications the reason the ALJ did void the regulations at issue was due to the ALJ's determination that he did not have authority to do so.

Notwithstanding Applicant's argument, it is clear that the ALJ applied the appropriate regulations to the issues at hand, and ultimately determined, correctly, that New Mexico's program Complied with the statutory requirements. The Department's regulations at the appendix of Subpart K of 34 CFR Part 222 were promulgated in the exercise of the Department's rule-making authority by implementing a specific statutory provision with regulations that clarify the general rights end obligations, beyond a specific case, of states that seek federal impact aid funds using the congressionally mandated equalization formula.

The impact aid statute requires that in determining whether a state's funding is equalized, the Department direct states to calculate their disparity percentage by disregarding per-pupil public education funding for LEAs whose funding is above the 95th percentile or below the 5th percentile of public education revenues in the state.[21] The Department

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[20] Although Applicant States that it does not seek a reversal of the ALJ's decision, Applicant ostensibly seeks the same outcome as a reversal by requesting that I "decertify New Mexico as an equalized state." Apparently, in Applicant's view, this outcome is warranted as a result of a conclusion that the Department's impact aid regulations are in conflict with the governing statute.

[21] See 20 U.S.C. § 7709(b)(2(B)(i) and 34 C.F.R. § 222.162(a).

implemented this statutory obligation by promulgating the regulations at the appendix of Subpart K of 34 CFR Part 222, wherein it requires states to compute the state's disparity percentage by ranking the state's LEAs and disregard those LEAs in the ranking that fall at the 95th and 5th percentiles of the total number of pupils in attendance in the schools of those LEAs. There is nothing within the text of the statute that precludes this interpretation or *requires* another result.

The appendix regulations simply assist states in determining how to decide the percentile cut-off points designated by the statute, but not defined by the statute. The fact that Applicant disagrees that the percentile cut-off points should not be positioned precisely at the per-pupil level does not render the Department's interpretation of the statute "invalid" or unreasonable.[22] As such, the regulatory appendix is binding "unless procedurally defective.[23] In this regard, the Applicant does not dispute that the regulations at issue were promulgated in accordance with the Department's rule-making authority and in compliance with the Administrative Procedure Act's requirements of notice and comment.

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[22] According to Applicant, there are two additional interpretations of the statute, either of which would satisfy Applicant; namely, to direct states to calculate the disparity percentage by disregarding the top and bottom 5% of the ranked LEAs or "multiply the per-pupil figures for the highest LEA by 95% and per-pupil figures for the lowest LEA by 105%" and disregard LEAs above and below the respective lines Since these methods were presented to the ALJ and flatly rejected by the ALJ's judgment, I need not revisit reasons why Applicant's proposed calculations are not pertinent to whether the Department's regulatory appendix contains a reasonable implementation of the statute's disparity test.

[23] *U.S. v. Mead*, No. 99-1434, _U.S. _(June 18, 2001).

The considerable weight usually accorded the Department's interpretation of the statute that it is entrusted to administer should apply to the regulations at the appendix of Subpart K of 34 CFR Part 222;[24] those regulations are consistant with the statutory provision they implement. Accordingly, consistent with this modification of the Initial Decision of Chief Administrative Law Judge Allan C. Lewis, the challenges by the Applicants are DISMISSED, and the determination by the Assistant Secretary for Elementary and Secondary Education is affirmed.

So ordered this 11 day of October 2001.

/s/
Rod Paige

Washington, D.C.

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[24] The Supreme Court recently spoke directly to this issue by explaining that it should be "apparent from the agency's generally conferred authority and other statutory circumstances that congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which 'Congress did not actually have an intent' as to a particular result." *Id.* at 9.

## APPENDIX D

**UNITED STATES DEPARTMENT OF EDUCATION**

**OFFICE OF ELEMENTARY AND SECONDARY EDUCATION**

NOTICE OF CERTIFICATION UNDER SECTION 8009(b) OF THE ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965 (20 U.S.C. § 7709 (b))

State- New Mexico

Period of Certification - July 1, 1999 - June 30, 2000

As further described in the enclosed report, we have determined that New Mexico is eligible to take into consideration Impact Aid payments in determining State aid to local educational agencies in accordance with section 8009 (b) of the Elementary and Secondary Education Act of 1965, as amended by the Improving America's Schools Act of 1994 (20 U.S.C. § 7709 (b)) for the period noted above.

Any local educational agency adversely affected by this action may request, in writing and within 30 days of the receipt of this notice, a hearing under section 8009 (c) (3) (B) and 34 C.F.R. § 222.165. A request for a hearing should be sent to: Director, Impact Aid Program, U.S. Department of Education, 400 Maryland Avenue, S.W., Washington, D.C. 20202-6244.

Enclosure

/s/
Catherine Schagh, Director
Impact Aid Program

**U. S. Department of Education**
**Office of Hearings & Appeals**

**Docket No. 99-81-I**

**[Filed April 17, 2001]**

| | |
|---|---|
| IN THE MATTER OF | ) |
| ZUNI PUBLIC SCHOOL | ) |
| DISTRICT #89 and | ) |
| GALLUP-MCKINLEY | ) |
| PUBLIC SCHOOLS INITIAL | ) |
| | ) |

**Impact Aid Proceeding**

Before: Chief Administrative Law Judge

This is a proceeding initiated by two local educational agencies, the Zuni Public School District #89 (Zuni) and the Gallup-McKinley Public Schools (Gallup), to contest a determination and certification by the Assistant Secretary for Elementary and Secondary Education (Assistant Secretary) that, for the fiscal year 1999-2000, the State of New Mexico had in effect a program of aid that equalizes expenditures for free public education among its local educational agencies in compliance with 20 U.S.C. § 7709(b) (1994). Due to its interest in this matter, the State of New Mexico (New Mexico) was allowed to participate as an intervenor.

Based upon the submissions of the parties, the record, and for the reasons stated, *infra*, it is concluded that the determination is correct and, accordingly, the appeals by Zuni and Gallup are dismissed with prejudice.

## I. OPINION

There is a general prohibition that a State may not consider Federal impact aid payments to a local educational agency (LEA) in determining the amount of the State's contribution to the LEA for free public education. 20 U.S.C. § 7709(a) (1994). An exception to the general prohibition permits a State to consider Federal impact aid if a State "has in effect a program of State aid that equalizes expenditures for free public education among local educational agencies in such State." 20 U.S.C. § 7709(b)(1).

In 1994, Congress adopted the disparity test as the sole means to determine whether a State had a program of State aid that equalizes expenditures among its local educational agencies. Equalization is present -

> if, in the second fiscal year preceding the fiscal year for which the determination is made, the amount of per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the highest such per-pupil expenditures or revenues did not exceed the amount of such per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the lowest such expenditures or revenues by more than twenty-five percent (25%).

20 U.S.C. § 7709(b)(2)(A).

In determining whether the disparity percentage is more than 25 percent, the Secretary shall "disregard local educational agencies with per pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State." 20 U.S.C.

§ 7709(b)(2(B)(i); 34 C.F.R. § 222.162(a) (1999). Then, the disparity percentage is calculated, first, by determining the difference between the current expenditure or revenue per pupil of the LEA at the 95th percentile and the current expenditure or revenue per pupil of the LEA at the 5th percentile. This difference is then divided by current expenditure or revenue per pupil figure of the LEA at the 5th percentile and yields the disparity percentage.

The Appendix to Subpart K of 34 C.F.R. Part 222 mandates that the student population of the State, not the LEA population, be used to determine the per pupil expenditure or revenue at the 5th and 95th percentiles –

> [the determinations of disparity are made by ranking all LEAs and then] identifying those LEAs in each ranking that fall at the 95th and 5th percentiles of the total number of pupils in attendance in the schools of those LEAs.
>
> . . . .
>
> *Example*: In State X, after ranking all LEAs . . . in order of the expenditures per pupil for the fiscal year in question, it is ascertained by counting the number of pupils in attendance in those agencies in ascending order of expenditures that the 5th percentile of student population is reached at LEA A with a per pupil expenditure of $820 and that the 95th percentile of student population is reached at LEA B with a per pupil expenditure of $1,000.

For the fiscal year 1999-2000, New Mexico had a range of revenue per membership (*i.e.* per student) between a low of $2,672 for students attending the LEA Des Moines and a

high of $6,520 for students attending the LEA Mosquero. Based upon the ranking of the State's membership, the 5th percentile of membership was $2,848 and fell within the membership of the LEA Hobbs. The 95th percentile of membership was $3,259 and fell within the membership at the LEA Penasco. These two percentiles of revenue per membership yielded a disparity percentage of 14.43% which was well under the 25% maximum limitation. Thus, the Assistant Secretary certified New Mexico's program as a program that equalizes expenditures for free public education under 20 U.S.C. § 7709(c)(3)((A).

Zuni challenges the certification of New Mexico on several grounds. Its main disagreement concerns the usage of the student membership population rather than the LEA population to determine the cutoff points at the 5th and 95th percentiles for purposes of the disparity test. In its view, 20 U.S.C. § 7709(b)(2)(B) mandates the usage of a State's population of LEAs to determine the cutoff points in clear and unambiguous terms –

> (B) . . . In making a determination under this subsection, the Secretary shall –
>
> (i) disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State . . . .

Hence, Zuni urges the tribunal to disregard the student membership approach adopted in the regulation and to follow

the statute in determining whether New Mexico has an equalized program.[25] This argument requires the tribunal to invalidate the Appendix to the regulation.[26]

The Assistant Secretary responds that 20 U.S.C § 7709(b)(2)(B)(i), as enacted in 1994, was an attempt to codify the disparity standard set forth in the regulations interpreting the former 20 U.S.C. § 240(d)(2) (1993) and that, for unknown reasons, the draftsmen "slightly altered" its language creating the present controversy over its construction. He argues that the current appendix of the regulation, which mandates cutoff points based upon the population of students, represents a reasonable interpretation of the provision. In his view, such an interpretation is fully consistent with the remainder of 20 U.S.C § 7709, its predecessor statute, and underlying regulations. It is also consistent with the standards used in statistics and the

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[25] Zuni advances several approaches in ranking the LEAs. Under all of its methods, New Mexico exceeds the maximum allowable disparity percentage and, therefore, its program was not in compliance with 20 U.S.C. § 7709(b)(2)(A).

[26] During the oral argument, the tribunal voiced a serious concern whether it could invalidate a regulation that conflicted with a statute. In a subsequent filing, Zuni reconfigured its argument. Now, it emphasizes the disharmony between the Appendix and 34 C.F.R. § 222.162(a), a regulation whose language is identical to 20 U.S.C. § 7709(b)(2)(B). This view requires the tribunal to resolve only a conflict within the regulations, something that Zuni urges the tribunal is empowered to do. While Zuni's argument is quite resourceful, it ignores the substance and reality of the present issue, namely whether the Appendix is consistent with its underlying statute. As explained below, this is a matter for a Federal court to resolve.

financial measurement of educational institutions. In his reply brief, the Assistant Secretary belatedly adds that the tribunal lacks the authority to overturn a Departmental regulation under *In re Smithville R-II School District*, Dkt. No. 91-4-I, U.S. Dept of Education (Sec. Dec. July 27, 1992).

In *Smithville*, the Secretary held that "[t]he Administrative Law Judge does not have authority to overturn a Department regulation, and as a matter of public policy the Secretary is extremely reluctant to overturn a regulation established through the formal rulemaking process." *Id.* at 1. The rational for this holding is set forth in *Lemont Township High School*, Dkt. No. 89-48-I, U.S. Dept of Education (ALJ Op. Feb. 6, 1992) (aff'm May 4, 1992). A tribunal must have either the inherent authority or a specific statutory authority to rule on such a question. Inherent authority lies with an Article III court such as a Federal district court. Tribunals with specific statutory authority include legislative courts such as the Article I, United States Tax Court or other boards such as the Benefits Review Board within the Department of Labor. *Lemont* concluded that a hearing authorized under 20 U.S.C. § 240(g) (1988) and conducted in accordance with the Administrative Procedure Act, 5 U.S.C. § 551 *et. seq.*, and 34 C.F.R. Part 218 (1988) had neither the inherent authority nor the specific statutory authority to rule on the validity of regulations. *Id.* at 5-6.

Zuni invites the tribunal to reconsider the *Lemont* decision as it pertains to the absence of specific statutory authority to rule on this type of an issue. In *Lemont* the tribunal stated that –

> Congress created several boards or other tribunals with specific authority to pass upon this question. For example, the Tax Court of the United States . . .

Similarly, the Benefits Review Board, a body within the Department of Labor, was created by Congress in 1972 and was given this specific authority according to the Sixth Circuit in *Gibas*, 748 F.2d 1112 (1984) . . .

In *Gibas*, the Sixth Circuit noted that the Board was created to fulfill the review function previously performed by the [federal] district courts regarding benefit requests under several federal workers' compensation programs. Congress expressly granted the Board the authority under 33 U.S.C. § 921 (b)(3) "to hear and determine appeals raising a substantial question of law or fact." The Board could not engage in *de novo* review of an administrative law judge's determination and could only set aside this determination if it was not supported by substantial evidence or not in accordance with the law. Decisions by the Board were appealable to the courts of appeal. In these circumstances, the Sixth Circuit concluded that –

> [I]n sum, the Board performs the identical appellate function previously performed by the district courts. Therefore, it appears that Congress intended to vest in the Board the same judicial power to rule on substantive legal questions as was possessed by the district courts. *See Carozza v. United States Steel Corp.*, 727 F.2d 74 (3d Cir. 1984).

*Id.* at 1118. It held, therefore, that the specific statutory authority conferred by Congress on the Board to decide appeals raising a "substantial question

> of law" included the authority to declare invalid regulations promulgated by the Secretary of Labor.
>
> In the case at bar, it is apparent that Congress did not specifically authorize the tribunal to pass on the validity of regulations issued by the Secretary of Education. . . [The hearing is conducted in accordance with the Administrative Procedure Act. The initial decision is] made subject to the published rules of the agency . . . [that includes] the regulations promulgated by the Secretary of Education. . . Hence, it is apparent that Congress did not specifically authorize the tribunal to pass upon the validity of regulations promulgated by the Secretary of Education. In fact, Congress required that the administrative law judge should follow the published rules of his or her agency.

*Id.* at 4-6.

Zuni advances several arguments urging that the tribunal may rule on the validity of a regulation. First, 20 U.S.C. § 7711(a) permits a broad scope of adjudication as it provides that "any action of the Secretary" may be reviewed and thus, it may include this issue. Second, unlike a typical chain of review that consists of the administrative law judge, a district court, and a court of appeals, the present process utilizes only an administrative law judge and a court of appeals. As such, Zuni asserts that the function of the district court must now be performed by the administrative law judge and, therefore, the tribunal may rule on the validity of a regulation.

In *Gibas*, the chain of review was an important factor because it showed that the Benefits Review Board replaced the Federal district court as the reviewing tribunal and that, coupled with a review authority similar to that possessed by

a Federal district court, led the court to conclude that the Benefits Review Board had the authority to pass on the validity of a regulation. Under 20 U.S.C. § 240(g) (1980), the predecessor of 20 U.S.C. § 7711, and 34 C.F.R. § 222.69 (1980), the chain of review began with the administrative law judge. His decision was subject to review by the Secretary of Education before the matter proceeded to a Federal district court. In 1994, Congress changed the process and eliminated the Federal district court. Thus, an appeal of an adverse decision by the Secretary of Education now goes directly to a Federal court of appeals. While the chain of review was modified, Congress carried over intact, in 20 U.S.C. § 7711(a), the language of 20 U.S.C. § 240 (g) that authorized a LEA or State to contest "any action of the Secretary" in an administrative hearing before an administrative law judge. Thus, neither the present appeal process nor the provision authorizing the administrative hearing suggest that Congress granted the administrative law judge the authority to invalidate a regulation.

Zuni also notes that 5 U.S.C. § 706 and case law in the Tenth Circuit require that, in order for an appellate court to consider a matter on review, the issue must have been raised below and a record made thereof. Accordingly, it urges that the tribunal must consider the validity issue. Zuni's point is true as a general matter. However, this rule is limited to a matter that the lesser tribunal has authority to address and resolve. Here, the first tribunal with authority to address the validity of a regulation is the Federal court of appeals. In sum, Zuni's arguments do not persuade the tribunal to request the Secretary to reconsider the *Smithville* decision.

Next, Zuni argues that several errors were made in computing LEA revenue per membership for purposes of the disparity test. In this calculation, 20 U.S.C. § 7709

(b)(2)(B)(ii) requires that the total expenditures or revenues of a LEA be adjusted to eliminate any additional expenditures or revenues incurred for the special needs of students or for the unusual needs of a LEA –

> (B) . . . [I]n making a determination . . . the Secretary shall . . .
>
> (ii) take into account the extent to which a program of State aid reflects the additional cost of providing free public education in particular types of local educational agencies, such as those that are geographically isolated, or to particular types of students, such as children with disabilities.

These additional costs or revenues, commonly called special cost differentials, are further defined by the Secretary as--

> (i) [t]hose [costs] associated with pupils having special education needs, such as children with disabilities, economically disadvantaged children, non-English speaking children, and gifted and talented children; and
>
> (ii) [t]hose [costs] associated with particular types of LEAs such as those affected by geographical isolation, sparsity or density of population, high cost of living, or special socioeconomic characteristics within the area served by an LEA.

34 C.F.R. § 222.162(c)(2).

New Mexico considered three categories of LEA revenue as special cost differentials and, therefore, excluded these revenues from each LEA's total revenue in computing the LEA's revenue per membership. Zuni disagrees with this treatment. Each category of revenue possesses, however, the

characteristics of a special cost differential. The "save harmless" category (N.M.S.A. 22-8-25(D)(3)) represents an adjustment for sparsity of population and economic adversity as it provides additional revenue for a small school district, *i.e.* one with less than a 200 membership or that experiences a decline in membership. A LEA experiencing abnormal growth (N.M.S.A. § 22-8-23.1) receives additional revenues to cope with the effect of a sudden increase in density of its student population. A small and rural school district (N.M.S.A. § 22-8-23) is entitled to additional revenue to offset the economic impact of its rural isolation. Accordingly, the revenue attributable to these three categories was properly excluded from the LEA's total revenue in computing its revenue per membership.

Lastly, New Mexico treated two LEA programs (the special education and bilingual programs) as special cost differentials. It, therefore, eliminated the revenue from these programs in the LEA's total revenue in computing the LEA's revenue per membership. The amount of the reduction was determined by multiplying the number of membership program units attributable to each program by the statewide program unit value, a dollar value set, in effect, by the legislature each year. The parties do not dispute the appropriateness of a revenue reduction only the amount thereof. The issue is whether, in determining the amount of the revenue reduction for each LEA, its teacher training and experience index should be taken into consideration. New Mexico argues that the index should not affect the amount of the revenue reduction because it was simply following prior instructions by the Department regarding the treatment of this item. The Assistant Secretary and New Mexico also argue that the exclusion of the index produces a revenue reduction directly related to these programs.

The resolution of this issue lies in understanding the function of the index within the State's funding formula Under the funding formula, a LEA determines the number of its membership program units. This is the sum of the product of the student membership in each of the four educational programs (early childhood, basic, special education, and bilingual) and the cost differential factor for each program. The total number of membership program units is multiplied by the LEA's teacher training and experience index and, for purposes relevant here, yields the LEA's number of program units. The LEA's revenue or program cost is then the product of its program units and the statewide program unit value.

The cost differential factors assigned to the four educational programs represent an effort by the legislature to establish a comparative cost basis among the programs. While a cost differential factor has a salary component, it does not reflect, as to each LEA, the particular salary level of its staff. This is accomplished under the funding formula through the teacher training and experience index, an index that varies between 1.0 and 1.227, and is assigned based on the academic training and teaching experience of the LEA's staff. N.M.S.A. § 22-8-24. Since the cost differential factor and the index are adjustments to reflect costs incurred in the various programs, each must be considered in order to determine the total revenue attributable to a particular program. As such, the proper approach to determine the revenue attributable to the special education or the bilingual program for a LEA is to multiply three items: the membership program units for the particular program (which includes an adjustment for its cost differential factor), its teacher training and experience index, and the statewide program unit value.

While New Mexico's computation of the disparity test is in error due to the exclusion of the teacher training and

experience index, its inclusion has minimal effect on the disparity test computation and does not change the result under the disparity test. Accordingly, New Mexico's program remains qualified under the disparity test.

Gallup maintains that New Mexico took too much of Gallup's Federal impact aid into consideration in determining the amount of the State's contribution to the LEA. As noted above, a State that has a qualified program may take into consideration payments of Federal impact aid in determining the financial need of its LEAs. The State may consider "as local resources [Federal impact aid] funds . . . only in proportion to the share that local tax revenues covered under a State equalization program are of total local tax revenues." Section 7709(d)(1)(B); 34 C.F.R. § 222.162(a). The proportion is obtained "by dividing the amount of local tax revenues covered under the equalization program by the total local tax revenues attributable to current expenditures for free public education within that LEA." 34 C.F.R. § 222.163(b).[27]

In its filings with the Department for the fiscal year 1999-2000, New Mexico considered as local revenue 75% of the LEA's Federal impact aid. New Mexico levied a statewide .5 mil property tax to raise funds for current expenditures for educational services. N.M.S.A. § 7-37-7.B(2). Of this

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[27] Local tax revenues covered under the equalization program are defined as local tax revenues levied for current expenditures for educational services that are taken into consideration in a State aid program. 34 C.F.R. § 222.161(c). Total local tax revenues are all local tax revenues levied for current expenditures for educational services but excludes revenues from State and Federal sources. 34 C.F.R. § 222.161(c).

amount, 75% was designated as local tax revenue under the States equalization program. N.M.S.A. § 22-8-25(B).

Gallup raises three alternative arguments in an effort to substantially reduce the amount of Federal impact aid that may be considered by New Mexico under its equalization program. It urges that, for the fiscal year 1999-2000, the offset for Federal impact aid funds be limited to –

1. The amount of local tax revenues generated by the .5 mil levy in fiscal year 1999-2000, e.g. approximately $245,774 in Gallup's case;

2. The proportion of statewide property tax revenues that existed in 1974-1975, the first year of the equalization program, *i.e.* that Federal impact aid may be considered as a local resource to the extent of 35% of the projected property tax revenues;[28] or

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[28] In 1974-1975, the percentage of total statewide property tax revenues and Federal impact aid revenues was 65% and 35%, respectively. Based upon projected property tax revenues of $7,208,379 for the fiscal year 1999-2000 and assuming these revenues represent 65% of the districts' contribution, then the corresponding amount of Federal impact aid revenue is $3,881,435. Since Gallup's share of the total statewide Federal impact aid revenue is 46% for fiscal year 1999-2000, it argues that the State may consider as local resources only 46% of the $3,881,435 or $1,785,460. Under this alternative, Gallup retains approximately $23 million of its Federal impact aid revenue.

3. The proportion that a LEA's local property taxes imposed to support its schools bears to the total local property taxes imposed to support all public schools within the State.[29]

At the heart of Gallup's arguments is its frustration with the actions of the State over the past two decades toward funding public education. It has significantly reduced the property tax as a source of revenue while continuing to rely heavily upon the Federal impact aid revenues received by Gallup and other LEAs.

Gallup's three alternative interpretations are not consistent with the statutory language of 20 U.S.C. § 8009(d)(1)(B). The first proposal limits the Federal impact aid to the amount of the local property tax imposed; however, 20 U.S.C. § 8009(d)(1)(B) requires a proportion of local taxes to determine the percentage of Federal impact aid that may be considered as a local resource. While the second alternative employs a proportional method, the proportion is based on the local taxes collected during 1974-1975, the first year of the equalization program. The statute requires a yearly computation of the proportion using tax revenue figures appropriate to that year.

Gallup's third alternative utilizes a proportional approach; however, neither the numerator nor the denominator conform to the statutory mandate. Gallup's numerator is the LEA's total local property tax revenue while

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[29] For example, in McKinley county where Gallup operates, the local tax assessment was $245,774 and the statewide total local tax assessment was $7,699,000. As such, McKinley's share was 3.19%. Accordingly, the amount of Federal impact that may be considered as local resources is the product of the amount of McKinley's Federal impact aid and 3.19%.

20 U.S.C. § 8009(d)(1)(B) limits the local tax revenue only to the revenue covered under the equalization program. Gallup's denominator reflects the local property tax revenue on a statewide basis rather than the total local tax revenue of an individual LEA as required by the statute–

> [the proportion is obtained] by dividing the amount of local tax revenues covered under the equalization program by the total local tax revenues attributable to current expenditures for free public education within *that* LEA.

34 C.F.R. 222.163(b) (emphasis added).

In summary, the Assistant Secretary's determination is upheld in all respects except for the treatment accorded the teacher training and experience index. This index must be considered as one factor in determining the amount of revenue attributable to the special education and bilingual programs. The Assistant Secretary properly certified New Mexico's program as complying with 20 U.S.C. § 7709(b).

## II. ORDER

On the basis of the foregoing findings of fact and conclusions of law and the proceedings herein, it is HEREBY ORDERED that the appeals of Zuni and Gallup are dismissed with prejudice.

/s/
Allan C. Lewis
Chief Administrative Law Judge

Issued: April 17, 2001
Washington, D.C.

# APPENDIX E

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

### 20 U.S.C. § 7709

**§ 7709. State consideration of payments in providing State aid**

**(a) General prohibition**

Except as provided in subsection (b) of this section, a State may not—

(1) consider payments under this subchapter or under the Act of September 30, 1950 [20 U.S.C.A. §§ 236 to 244] (Public Law 874, 81st Congress) (as such Act was in effect on the day preceding October 20, 1994) in determining for any fiscal year—

(A) the eligibility of a local educational agency for State aid for free public education; or

(B) the amount of such aid; or

(2) make such aid available to local educational agencies in a manner that results in less State aid to any local educational agency that is eligible for such payment than such agency would receive if such agency were not so eligible.

**(b) State equalization plans**

**(1) In general**

A State may reduce State aid to a local educational agency that receives a payment under section 7702 or 7703(b) of this title (except the amount calculated in excess of 1.0 under subparagraph (B) of section 7703(a)(2) of this title) or under the Act of September 30, 1950 (Public Law 874, 81st Congress) [20 U.S.C.A. §§ 236 to 244] as such Act was in effect on the day preceding October 20, 1994 (other than an increase in payments described in paragraphs (2)(B), (2)(C), (2)(D), or (3)(B)(ii) of section 3(d) of such Act of September 30, 1950 [20 U.S.C.A. § 238(d)]) for any fiscal year if the Secretary determines, and certifies under subsection (c)(3)(A) of this section, that such State has in effect a program of State aid that equalizes expenditures for free public education among local educational agencies in such State.

**(2) Computation**

**(A) In general**

For purposes of paragraph (1), a program of State aid equalizes expenditures among local educational agencies if, in the second fiscal year preceding the fiscal year for which the determination is made, the amount of per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the highest such per-pupil expenditures or revenues did not exceed the amount of such per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in

the State with the lowest such expenditures or revenues by more than 25 percent.

**(B) Other factors**

In making a determination under this subsection, the Secretary shall—

**(i)** disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State; and

**(ii)** take into account the extent to which a program of State aid reflects the additional cost of providing free public education in particular types of local educational agencies, such as those that are geographically isolated, or to particular types of students, such as children with disabilities.

**(3) Exception**

Notwithstanding paragraph (2), if the Secretary determines that the State has substantially revised its program of State aid, the Secretary may certify such program for any fiscal year only if—

**(A)** the Secretary determines, on the basis of projected data, that the State's program will meet the disparity standard described in paragraph (2) for the fiscal year for which the determination is made; and

**(B)** the State provides an assurance to the Secretary that, if final data do not demonstrate that the State's program met such standard for the fiscal year for

which the determination is made, the State will pay to each affected local educational agency the amount by which the State reduced State aid to the local educational agency.

**(c) Procedures for review of State equalization plans**

**(1) Written notice**

**(A) In general**

Any State that wishes to consider payments described in subsection (b)(1) of this section in providing State aid to local educational agencies shall submit to the Secretary, not later than 120 days before the beginning of the State's fiscal year, a written notice of such State's intention to do so.

**(B) Contents**

Such notice shall be in the form and contain the information the Secretary requires, including evidence that the State has notified each local educational agency in the State of such State's intention to consider such payments in providing State aid.

**(2) Opportunity to present views**

Before making a determination under subsection (b) of this section, the Secretary shall afford the State, and local educational agencies in the State, an opportunity to present their views.

**(3) Qualification procedures**

If the Secretary determines that a program of State aid qualifies under subsection (b) of this section, the Secretary shall—

**(A)** certify the program and so notify the State; and

**(B)** afford an opportunity for a hearing, in accordance with section 7011(a) of this title, to any local educational agency adversely affected by such certification.

**(4) Non-qualification procedures**

If the Secretary determines that a program of State aid does not qualify under subsection (b), the Secretary shall—

**(A)** so notify the State; and

**(B)** afford an opportunity for a hearing, in accordance with section 7711(a) of this title, to the State, and to any local educational agency adversely affected by such determination.

**(d) Treatment of State aid**

**(1) In general**

If a State has in effect a program of State aid for free public education for any fiscal year, which is designed to equalize expenditures for free public education among the local educational agencies of that State, payments under this subchapter or under the Act of September 30, 1950

(Public Law 874, 81st Congress) [20 U.S.C.A. §§ 236 to 244] (as such Act was in effect on the day preceding October 20, 1994) for any fiscal year may be taken into consideration by such State in determining the relative—

**(A)** financial resources available to local educational agencies in that State; and

**(B)** financial need of such agencies for the provision of free public education for children served by such agency, except that a State may consider as local resources funds received under this subchapter or under the Act of September 30, 1950 (Public Law 874, 81st Congress) [20 U.S.C.A. §§ 236 to 244] (as such Act was in effect on the day preceding October 20, 1994) only in proportion to the share that local tax revenues covered under a State equalization program are of total local tax revenues.

**(2) Prohibition**

A State may not take into consideration payments under this subchapter or under the Act of September 30, 1950 (Public Law 874, 81st Congress) [20 U.S.C.A. §§ 236 to 244] (as such Act was in effect on the day preceding October 20, 1994) before such State's program of State aid has been certified by the Secretary under subsection (c)(3) of this section.

**(e) Remedies for State violations**

**(1) In general**

The Secretary or any aggrieved local educational agency may, not earlier than 150 days after an adverse

determination by the Secretary against a State for violation of subsections (a) or (d)(2) of this section or for failure to carry out an assurance under subsection (b)(3)(B) of this section, and if an administrative proceeding has not been concluded within such time, bring an action in a United States district court against such State for such violations or failure.

**(2) Immunity**

A State shall not be immune under the 11th amendment to the Constitution of the United States from an action described in paragraph (1).

**(3) Relief**

The court shall grant such relief as the court determines is appropriate.

History: (April 11, 1965, P.L. 89-10, Title VIII, § 8009, as added Oct. 20, 1994, P.L. 103-382, Title I, § 101, 108 Stat. 3764; Sept. 16, 1996, P.L. 104-195, § 10, 110 Stat. 2384; Oct. 30, 2000, P.L. 106-398, § 1, 114 Stat. 1654; Jan. 8, 2002, P.L. 107-110, Title VIII, § 804, 115 Stat. 1956.)

# 20 U.S.C. § 7711

## § 7711. Administrative hearings and judicial review

### (a) Administrative hearings

A local educational agency and a State that is adversely affected by any action of the Secretary under this subchapter or under the Act of September 30, 1950 (Public Law 874, 81st Congress) (as such Act was in effect on the day preceding October 20, 1994) shall be entitled to a hearing on such action in the same manner as if such agency were a person under chapter 5 of Title 5.

### (b) Judicial review of Secretarial action

#### (1) In general

A local educational agency or a State aggrieved by the Secretary's final decision following an agency proceeding under subsection (a) of this section may, within 60 days after receiving notice of such decision, file with the United States court of appeals for the circuit in which such agency or State is located a petition for review of that action. The clerk of the court shall promptly transmit a copy of the petition to the Secretary. The Secretary shall then file in the court the record of the proceedings on which the Secretary's action was based, as provided in section 2112 of Title 28.

#### (2) Findings of fact

The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive, but the court, for good cause shown, may remand the case to the

Secretary to take further evidence. The Secretary may thereupon make new or modified findings of fact and may modify the Secretary's previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

**(3) Review**

The court shall have exclusive jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

History: (April 11, 1965, P.L. 89-10, Title VIII, § 8011, as added Oct. 20, 1994, P.L. 103-382, Title I, § 101, 108 Stat. 3768.)

**Pub. L. No. 106-398, section 1814.**

**SEC. 1814. ADMINISTRATIVE HEARINGS AND JUDICIAL REVIEW.**

(a) ADMINISTRATIVE HEARINGS.—

(1) IN GENERAL.—Section 8011(a) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7711) is amended by adding at the end before the period the following: "if the local educational agency or State, as the case may be, submits to the Secretary a request for the hearing not later than 60 days after the date of the action of the Secretary under this title".

(2) EFFECTIVE DATE.—The amendment made by paragraph (1) shall apply with respect to an action of the Secretary under title VIII of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7701 et seq.) initiated on or after the date of the enactment of this Act.

(b) JUDICIAL REVIEW OF SECRETARIAL ACTION.—Section 8011(b)(1) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7711(b)(1)) is amended by striking "60 days" and inserting 30 working days (as determined by the local educational agency or State)".

## 20 U.S.C. § 240(d)(repealed).

**(d) Treatment of payments by States to determine eligibility for, and amount of, State aid; notice and opportunity for hearing; "State aid" and "equalize expenditures" defined; State equalization**

(1) Except as provided in paragraph (2), no payments may be made under this subchapter for any fiscal year to any local educational agency in any State (A) if that State has taken into consideration payments under this subchapter in determining—

> (i) the eligibility of any local educational agency in that State for State aid for free public education of children; or
>
> (ii) the amount of such aid with respect to any such agency;

during that fiscal year or the preceding fiscal year, or (B) if such State makes such aid available to local educational agencies in such a manner as to result in less State aid to any local educational agency which is eligible for payments under this subchapter than such agency would receive if such agency were not so eligible.

(2)(A) Notwithstanding paragraph (1) of this subsection, if a State has in effect a program of State aid for free public education for any fiscal year, which is designed to equalize expenditures for free public education among the local educational agencies of that State, payments under this subchapter for any fiscal year may be taken into consideration by such State in determining the relative—

(i) financial resources available to local educational agencies in that State; and

(ii) financial need of such agencies for the provision of free public education for children served by such agency, provided that a State may consider as local resources funds received under this subchapter only in proportion to the share that local revenues covered under a State equalization program are of total local revenues.

The increase in payments described in sections 238(d)(2)(B), 238(d)(2)(C), 238(d)(2)(D), and 238(d)(3)(B)(ii) of this title shall not be taken into consideration by the State for the purpose of this subparagraph. Whenever a State educational agency or local educational agency will be adversely affected by the operation of this subsection, such agency shall be afforded notice and an opportunity for a hearing prior to the reduction or termination of payments pursuant to this subsection.

(B) The terms "State aid" and "equalize expenditures" as used in this subsection shall be defined by the Secretary by regulation, after consultation with State and local educational agencies affected by this subsection, provided that the term "equalize expenditures" shall not be construed in any manner adverse to a program of State aid for free public education which provides for taking into consideration the additional cost of providing free public education for particular groups or categories of pupils in meeting the special educational needs of such children as handicapped children, economically disadvantaged, those who need bilingual education, and gifted and talented children.

(C) In the application of subparagraph (A) of this paragraph to any State having a program described in such

subparagraph (A) in effect on October 12, 1976, no payment may be withheld from and no repayment may be required of any State or local educational agency for any period prior to promulgation of final regulations, or, if the State is not in conformance with such regulations, until July 1, 1977.

(C)(i) If a State desires to take payments under this section into consideration as provided in this paragraph for any fiscal year, that State shall, not later than sixty days prior to the beginning of such fiscal year, submit notice to the Secretary of its intention to do so. Such notice shall be in such form and be accompanied by such information as to enable the Secretary to determine the extent to which the program of State aid of that State is consistent with the provisions of subparagraph (A). In addition, such notice shall be accompanied by such evidence as the Secretary finds necessary that each local educational agency in that State has been given notice of the intention of the State. If the Secretary determines that the program of State aid of a State submitting notice under this subparagraph is consistent with the provisions of subparagraph (A), the Secretary shall certify such determination to that State.

(ii) Prior to certifying any determination under division (i) for any State for any fiscal year, the Secretary shall give the local educational agencies in that State an opportunity for a hearing at which such agencies may present their views with respect to the consistency of the State aid program of that State with the provisions of subparagraph (A).

(iii) The Secretary shall not finally deny to any State for any fiscal year certification of a determination under division (i) without first giving that State an opportunity for a hearing.

# NEW MEXICO STATUTES ANNOTATED
# CHAPTER 22. PUBLIC SCHOOLS
# ARTICLE 8. PUBLIC SCHOOL FINANCE

## § 22-8-25. State equalization guarantee distribution; definitions; determination of amount

A. The state equalization guarantee distribution is that amount of money distributed to each school district to ensure that the school district's operating revenue, including its local and federal revenues as defined in this section, is at least equal to the school district's program cost.

B. "Local revenue", as used in this section, means seventy-five percent of receipts to the school district derived from that amount produced by a school district property tax applied at the rate of fifty cents ($.50) to each one thousand dollars ($1,000) of net taxable value of property allocated to the school district and to the assessed value of products severed and sold in the school district as determined under the Oil and Gas Ad Valorem Production Tax Act [7-32-1 NMSA 1978] and upon the assessed value of equipment in the school district as determined under the Oil and Gas Production Equipment Ad Valorem Tax Act [7-34-1 NMSA 1978].

C. "Federal revenue", as used in this section, means receipts to the school district, excluding amounts that, if taken into account in the computation of the state equalization guarantee distribution, result, under federal law or regulations, in a reduction in or elimination of federal school funding otherwise receivable by the school district, derived from the following:

(1) seventy-five percent of the school district's share of forest reserve funds distributed in accordance with Section

22-8-33 NMSA 1978; and

(2) seventy-five percent of grants from the federal government as assistance to those areas affected by federal activity authorized in accordance with Title 20 of the United States Code, commonly known as "PL 874 funds" or "impact aid".

D. To determine the amount of the state equalization guarantee distribution, the department shall:

(1) calculate the number of program units to which each school district is entitled using an average of the MEM on the eightieth and one hundred twentieth days of the prior year; or

(2) calculate the number of program units to which a school district operating under an approved year-round school calendar is entitled using an average of the MEM on appropriate dates established by the department; or

(3) calculate the number of program units to which a school district with a MEM of two hundred or less is entitled by using an average of the MEM on the eightieth and one hundred twentieth days of the prior year or the fortieth day of the current year, whichever is greater; and

(4) using the results of the calculations in Paragraph (1), (2) or (3) of this subsection and the instructional staff training and experience index from the October report of the prior school year, establish a total program cost of the school district;

(5) calculate the local and federal revenues as defined in this section;

(6) deduct the sum of the calculations made in Paragraph (5) of this subsection from the program cost established in Paragraph (4) of this subsection;

(7) deduct the total amount of guaranteed energy savings contract payments that the department determines will be made to the school district from the public school utility conservation fund during the fiscal year for which the state equalization guarantee distribution is being computed; and

(8) deduct ninety percent of the amount certified for the school district by the department pursuant to the Energy Efficiency and Renewable Energy Bonding Act [6-21D-1 NMSA 1978], if that act becomes law pursuant to House Bill 32 or similar legislation of the first session of the forty-seventh legislature.

E. Reduction of a school district's state equalization guarantee distribution shall cease when the school district's cumulative reductions equal its proportional share of the cumulative debt service payments necessary to service the bonds issued pursuant to the Energy Efficiency and Renewable Energy Bonding Act [6-21D-1 NMSA 1978], if that act becomes law pursuant to House Bill 32 or similar legislation of the first session of the forty-seventh legislature.

F. The amount of the state equalization guarantee distribution to which a school district is entitled is the balance remaining after the deductions made in Paragraphs (6) through (8) of Subsection D of this section.

G. The state equalization guarantee distribution shall be distributed prior to June 30 of each fiscal year. The calculation shall be based on the local and federal revenues

specified in this section received from June 1 of the previous fiscal year through May 31 of the fiscal year for which the state equalization guarantee distribution is being computed. In the event that a school district has received more state equalization guarantee funds than its entitlement, a refund shall be made by the school district to the state general fund.

History: 1953 Comp., § 77-6-19, enacted by Laws 1969, ch. 180, § 19; 1971, ch. 263, § 9; 1972, ch. 90, § 1; reenacted by Laws 1974, ch. 8, § 16; 1975, ch. 119, § 3; 1979, ch. 268, § 2; 1979, ch. 278, § 1; reenacted by Laws 1981, ch. 176, §§ 3, 4, 5; 1986, ch. 32, § 20; 1986, ch. 33, § 16; 1988, ch. 63, § 1; 1988, ch. 64, § 29; 1989, ch. 258, § 1; 1990, ch. 94, § 3; 1993, ch. 226, § 23; 1993, ch. 231, § 14; 1997, ch. 40, § 8; 1999, ch. 275, § 1; 2002, ch. 63, § 1; 2005, ch. 176, § 12; 2005, ch. 291, § 1.

## 34 C.F.R. Part 222, Subpart K (including Appendix to Subpart K).

## Subpart K—Determinations Under Section 8009 of the Act

### § 222.160 What are the scope and purpose of this subpart?

(a) *Scope*. This subpart applies to determinations made by the Secretary under section 8009 of the Act.

(b) *Purpose*. The sole purpose of the regulations in this subpart is to implement the provisions of section 8009. The definitions and standards contained in this subpart apply only with respect to section 8009 and do not establish definitions and standards for any other purpose.

(Authority: 20 U.S.C. 7709)

### § 222.161 How is State aid treated under section 8009 of the Act?

(a) *General rules*. (1) A State may take into consideration payments under sections 8002 and 8003(b) of the Act (including hold harmless payments calculated under section 8003(e)) in allocating State aid if that State has a State aid program that qualifies under § 222.162, except as follows:

(i) Those payments may be taken into consideration for each affected local educational agency (LEA) only in the proportion described in § 222.163.

(ii) A State may not take into consideration that portion of an LEA's payment that is generated by the

portion of a weight in excess of one under section 8003(a)(2)(B) of the Act (children residing on Indian lands) or payments under section 8003(d) of the Act (children with disabilities), section 8003(f) of the Act (heavily impacted LEAs) and section 8003(g) of the Act (LEAs with high concentrations of children with severe disabilities).

(iii) A State may not take into consideration increases in payment under the following subsections of section 3(d) of Pub. L. 81-874:

(A) Section 3(d)(2)(B) (increase for heavily impacted LEAs).

(B) Section 3(d)(2)(C) (increase for children with disabilities and children with specific learning disabilities).

(C) Section 3(d)(2)(D) (increase for children residing on Indian lands).

(D) Section 3(d)(3)(B)(ii) (increase for unusual geographical factors).

(2) No State aid program may qualify under this subpart if a court of that State has determined by final order, not under appeal, that the program fails to equalize expenditures for free public education among LEAs within the State or otherwise violates law, and if the court's order provides that the program is no longer in effect.

(3) No State, whether or not it has an equalization program that qualifies under § 222.162, may, in allocating State aid, take into consideration an LEA's eligibility for

payments under the Act if that LEA does not apply for and receive those payments.

(4) Any State that takes into consideration payments under the Act in accordance with the provisions of section 8009 in allocating State aid to LEAs must reimburse any LEA for any amounts taken into consideration for any fiscal year to the extent that the LEA did not in fact receive payments in those amounts during that fiscal year.

(5) A State may not take into consideration payments under the Act or under Public Law 874 before the State's State aid program has been certified by the Secretary.

(b) *Data for determinations.* (1) Except as provided in paragraph (b)(2) of this section, determinations under this subpart requiring the submission of financial or school population data must be made on the basis of final data for the second fiscal year preceding the fiscal year for which the determination is made if substantially the same program was then in effect.

(2)(i) If the Secretary determines that the State has substantially revised its State aid program, the Secretary may certify that program for any fiscal year only if—

(A) The Secretary determines, on the basis of projected data, that the State's program will meet the disparity standard described in § 222.162 for the fiscal year for which the determination is made; and

(B) The State provides an assurance to the Secretary that, if final data do not demonstrate that the State's program met that standard for the fiscal year for which the determination is made, the State will pay to

each affected LEA the amount by which the State reduced State aid to the LEA.

(ii) Data projections submitted by a State must set forth the assumptions upon which the data projections are founded, be accompanied by an assurance as to their accuracy, and be adjusted by actual data for the fiscal year of determination that must be submitted to the Secretary as soon as these data are available.

(c) *Definitions*. The following definitions apply to this subpart:

*Current expenditures* means the total charges incurred for the benefit of the school year in an elementary (including pre-kindergarten) or secondary school program. "Current expenditures" does not include—

(1) Expenditures for capital outlay;

(2) Expenditures for debt service for capital outlay;

(3) Expenditures from State sources for special cost differentials of the type specified in § 222.162(c)(2);

(4) Expenditures of revenues from local or intermediate sources that are designated for special cost differentials of the type specified in § 222.162(c)(2);

(5) Expenditures of funds received by the agency under sections 8002 and 8003(b) (including hold harmless payments calculated under section (e)) or under Pub. L. 81-874 that are not taken into consideration under the State aid program and exceed the proportion of those funds that the State would be allowed to take into

consideration under § 222.163; or

(6) Expenditures of funds received by the agency under Pub. L. 81-874 that were not taken into consideration under the State aid program and exceed the proportion of funds the State was permitted to take into consideration under that law.

*Equalize expenditures* means to meet the standard set forth in § 222.162.

*Local tax revenues* means compulsory charges levied by an LEA or by an intermediate school district or other local governmental entity on behalf of an LEA for current expenditures for educational services. "Local tax revenues" include the proceeds of ad valorem taxes, sales and use taxes, income taxes and other taxes. Where a State funding formula requires a local contribution equivalent to a specified mill tax levy on taxable real or personal property or both, "local tax revenues" include any revenues recognized by the State as satisfying that local contribution requirement.

*Local tax revenues covered under a State equalization program means* "local tax revenues" as defined in paragraph (c) of this section contributed to or taken into consideration in a State aid program subject to a determination under this subpart, but excluding all revenues from State and Federal sources.

*Revenue* means an addition to assets that does not increase any liability, does not represent the recovery of an expenditure, does not represent the cancellation of certain liabilities without a corresponding increase in other liabilities or a decrease in assets, and does not represent a contribution of fund capital in food service or pupil activity funds.

Furthermore, the term "revenue" includes only revenue for current expenditures.

*State aid* means any contribution, no repayment for which is expected, made by a State to or on behalf of LEAs within the State for current expenditures for the provision of free public education.

*Total local tax revenues* means all "local tax revenues" as defined in paragraph (c) of this section, including tax revenues for education programs for children needing special services, vocational education, transportation, and the like during the period in question but excluding all revenues from State and Federal sources.

(Authority: 20 U.S.C. 7709)

[60 FR 50774, 50797, Sept. 29, 1995, as amended at 62 FR 35419, July 1, 1997]

**§ 222.162 What disparity standard must a State meet in order to be certified and how are disparities in current expenditures or revenues per pupil measured?**

(a) *Percentage disparity limitation.* The Secretary considers that a State aid program equalizes expenditures if the disparity in the amount of current expenditures or revenues per pupil for free public education among LEAs in the State is no more than 25 percent. In determining the disparity percentage, the Secretary disregards LEAs with per pupil expenditures or revenues above the 95th or below the 5th percentile of those expenditures or revenues in the State. The method for calculating the percentage of disparity in a State is in the appendix to this subpart.

(b)(1) *Weighted average disparity for different grade level groups*. If a State requests it, the Secretary will make separate disparity computations for different groups of LEAs in the State that have similar grade levels of instruction.

(2) In those cases, the weighted average disparity for all groups, based on the proportionate number of pupils in each group, may not be more than the percentage provided in paragraph (a) of this section. The method for calculating the weighted average disparity percentage is set out in the appendix to this subpart.

(c) *Per pupil figure computations*. In calculating the current expenditures or revenue disparities under this section, computations of per pupil figures are made on one of the following bases:

(1) The per pupil amount of current expenditures or revenue for an LEA is computed on the basis of the total number of pupils receiving free public education in the schools of the agency. The total number of pupils is determined in accordance with whatever standard measurement of pupil count is used in the State.

(2) If a State aid program uses "weighted pupil," "classroom," "instructional unit," or another designated measure of need in determining allocations of State aid to take account of special cost differentials, the computation of per pupil revenue or current expenditures may be made on those bases. The two allowable categories of special cost differentials are—

(i) Those associated with pupils having special educational needs, such as children with disabilities, economically disadvantaged children, non-English

speaking children, and gifted and talented children; and

(ii) Those associated with particular types of LEAs such as those affected by geographical isolation, sparsity or density of population, high cost of living, or special socioeconomic characteristics within the area served by an LEA.

(d) *Revenues and current expenditures included in determinations.* All revenues or current expenditures must be included for each LEA in the State in determining the percentage of disparity under paragraph (a) of this section.

(Authority: 20 U.S.C. 7709)

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35419, July 1, 1997]

**§ 222.163 What proportion of Impact Aid funds may a State take into consideration upon certification?**

(a) *Provision of law.* Section 8009(d)(1)(B) provides that, upon certification by the Secretary, in allocating State aid a State may consider as local resources funds received under sections 8002 and 8003(b) (including hold harmless payments calculated under section 8003(e)) and Pub. L. 81-874 only in proportion to the share that local tax revenues covered under a State equalization program are of total local tax revenues. Determinations of proportionality must be made on a case-by-case basis for each LEA affected and not on the basis of a general rule to be applied throughout a State.

(Authority: 20 U.S.C. 7709)

(b) *Computation of proportion.* (1) In computing the share that local tax revenues covered under a State equalization program are of total local tax revenues for an LEA with respect to a program qualifying under § 222.162, the proportion is obtained by dividing the amount of local tax revenues covered under the equalization program by the total local tax revenues attributable to current expenditures for free public education within that LEA.

(2) In cases where there are no local tax revenues for current expenditures and the State provides all of those revenues on behalf of the LEA, the State may consider up to 100 percent of the funds received under the Act by that LEA in allocating State aid.

(Authority: 20 U.S.C. 7709(d)(1)(B))

(c) *Application of proportion to Impact Aid payments.* Except as provided in § 222.161(a)(1)(ii) and (iii), the proportion established under this section (or a lesser proportion) for any LEA receiving payments under sections 8002 and 8003(b) (including hold harmless payments calculated under section 8003(e)) and Pub. L. 81-874 may be applied by a State to actual receipts of those payments or payments under Pub. L. 81-874.

(Authority: 20 U.S.C. 7709(d)(1)(B))

**§ 222.164 What procedures does the Secretary follow in making a determination under section 8009?**

(a) *Initiation.* (1) A proceeding under this subpart leading to a determination by the Secretary under section 8009 may be initiated—

(i) By the State educational agency (SEA) or other appropriate agency of the State;

(ii) By an LEA; or

(iii) By the Secretary, if the Secretary has reason to believe that the State's action is in violation of section 8009.

(2) Whenever a proceeding under this subpart is initiated, the party initiating the proceeding shall give adequate notice to the State and all LEAs in the State and provide them with a complete copy of the submission initiating the proceeding. In addition, the party initiating the proceeding shall notify the State and all LEAs in the State of their right to request from the Secretary, within 30 days of the initiation of a proceeding, the opportunity to present their views to the Secretary before the Secretary makes a determination.

(b) *Submission*. (1) A submission by a State or LEA under this section must be made in the manner requested by the Secretary and must contain the information and assurances as may be required by the Secretary in order to reach a determination under section 8009 and this subpart.

(2)(i) A State in a submission shall—

(A) Demonstrate how its State aid program comports with § 222.162; and

(B) Demonstrate for each LEA receiving funds under the Act that the proportion of those funds that will be taken into consideration comports with § 222.163.

(ii) The submission must be received by the Secretary no later than 120 calendar days before the beginning of the State's fiscal year for the year of the determination, and must include (except as provided in § 222.161(c)(2)) final second preceding fiscal year disparity data enabling the Secretary to determine whether the standard in § 222.162 has been met. The submission is considered timely if received by the Secretary on or before the filing deadline or if it bears a U.S. Postal Service postmark dated on or before the filing deadline.

(3) An LEA in a submission must demonstrate whether the State aid program comports with section 8009.

(4) Whenever a proceeding is initiated under this subpart, the Secretary may request from a State the data deemed necessary to make a determination. A failure on the part of a State to comply with that request within a reasonable period of time results in a summary determination by the Secretary that the State aid program of that State does not comport with the regulations in this subpart.

(5) Before making a determination under section 8009, the Secretary affords the State, and all LEAs in the State, an opportunity to present their views as follows:

(i) Upon receipt of a timely request for a predetermination hearing, the Secretary notifies all LEAs and the State of the time and place of the predetermination hearing.

(ii) Predetermination hearings are informal and any LEA and the State may participate whether or not they requested the predetermination hearing.

(iii) At the conclusion of the predetermination hearing, the Secretary holds the record open for 15 days for the submission of post-hearing comments. The Secretary may extend the period for post-hearing comments for good cause for up to an additional 15 days.

(iv) Instead of a predetermination hearing, if the party or parties requesting the predetermination hearing agree, they may present their views to the Secretary exclusively in writing. In such a case, the Secretary notifies all LEAs and the State that this alternative procedure is being followed and that they have up to 30 days from the date of the notice in which to submit their views in writing. Any LEA or the State may submit its views in writing within the specified time, regardless of whether it requested the opportunity to present its views.

(c) *Determinations*. The Secretary reviews the participants' submissions and any views presented at a predetermination hearing under paragraph (b)(5) of this section, including views submitted during the post-hearing comment period. Based upon this review, the Secretary issues a written determination setting forth the reasons for the determination in sufficient detail to enable the State or LEAs to respond. The Secretary affords reasonable notice of a determination under this subpart and the opportunity for a hearing to the State or any LEA adversely affected by the determination.

(Approved by the Office of Management and Budget under control number 1810-0036)

(Authority: 20 U.S.C. 7709)

NOTE TO PARAGRAPH (b)(2) OF THIS SECTION: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, an applicant should check with its local post office.

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35419, July 1, 1997]

**§ 222.165 What procedures does the Secretary follow after making a determination under section 8009?**

(a) *Request for hearing.* (1) A State or LEA that is adversely affected by a determination under section 8009 and this subpart and that desires a hearing regarding that determination must submit a written request for a hearing within 30 days of receipt of the determination. The time within which a request must be filed may not be extended unless the Secretary, or the Secretary's delegatee, extends the time in writing at the time notice of the determination is given.

(2) A request for a hearing in accordance with this section must specify the issues of fact and law to be considered.

(3) If an LEA requests a hearing, it must furnish a copy of the request to the State. If a State requests a hearing, it must furnish a copy of the request to all LEAs in the State.

(b) *Right to intervene.* Any LEA or State that is adversely affected by a determination shall have the right of intervention in the hearing.

(c) *Time and place of hearing.* The hearing is held at a

time and place fixed by the Secretary or the Secretary's delegatee (with due regard to the mutual convenience of the parties).

(d) *Counsel.* In all proceedings under this section, all parties may be represented by counsel.

(e) *Proceedings.* (1) The Secretary refers the matter in controversy to an administrative law judge (ALJ) appointed under 5 U.S.C. 3105.

(2) The ALJ is bound by all applicable statutes and regulations and may neither waive them nor rule them invalid.

(f) *Filing requirements.* (1) Any written submission under this section must be filed by hand-delivery, mail, or facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(2) If agreed upon by the parties, service of a document may be made upon the other party by facsimile transmission.

(3) The filing date for a written submission under this section is the date the document is—

(i) Hand-delivered;

(ii) Mailed; or

(iii) Sent by facsimile transmission.

(4) A party filing by facsimile transmission is responsible for confirming that a complete and legible copy of the

document was received by the Department.

(5) Any party filing a document by facsimile transmission must file a follow-up hard copy by hand-delivery or mail within a reasonable period of time.

(g) *Procedural rules*. (1) If, in the opinion of the ALJ, no dispute exists as to a material fact the resolution of which would be materially assisted by oral testimony, the ALJ shall afford each party to the proceeding an opportunity to present its case—

(i) In whole or in part in writing; or

(ii) In an informal conference after affording each party sufficient notice of the issues to be considered.

(2) With respect to hearings involving a dispute as to a material fact the resolution of which would be materially assisted by oral testimony, the ALJ shall afford the following procedures to each party:

(i) Sufficient notice of the issues to be considered at the hearing.

(ii) An opportunity to make a record of the proceedings.

(iii) An opportunity to present witnesses on the party's behalf.

(iv) An opportunity to cross-examine other witnesses either orally or through written interrogatories.

(h) *Decisions*. (1) The ALJ—

(i) Makes written findings and an initial decision based upon the hearing record; and

(ii) Forwards to the Secretary, and mails to each party, a copy of the written findings and initial decision.

(2) Appeals to the Secretary and the finality of initial decisions under section 8009 are governed by §§ 222.157(b), 222.158, and 222.159 of subpart J of this part.

(Authority: 20 U.S.C. 7709)

(i) *Corrective action.* (1) Within 30 days after a determination by the Secretary that a State has been in violation of section 8009 unless the determination is timely appealed by the State, the State shall provide, within 30 days after disposal of the hearing request (such as by a final decision issued under this subpart or withdrawal of the hearing request), satisfactory assurances that it is taking corrective action, if necessary.

(2) A State found by the Secretary to have been in violation of section 8009 following a hearing shall provide, within 30 days after disposal of the hearing request (such as by a final decision issued under this subpart or withdrawal of the hearing request), satisfactory assurances that it is taking corrective action, if necessary.

(3) At any time during a hearing under this subpart, a State may provide the Secretary appropriate assurances that it will undertake corrective action if necessary. The Secretary or the ALJ, as applicable, may stay the proceedings pending completion of corrective action.

(Authority: 20 U.S.C. 7709)

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35420, July 1, 1997]

**§§ 222.166-222.169 [Reserved]**

APPENDIX TO SUBPART K— DETERMINATIONS UNDER SECTION 8009 OF THE ACT— METHODS OF CALCULATIONS FOR TREATMENT OF IMPACT AID PAYMENTS UNDER STATE EQUALIZATION PROGRAMS

The following paragraphs describe the methods for making certain calculations in conjunction with determinations made under the regulations in this subpart. Except as otherwise provided in the regulations, these methods are the only methods that may be used in making these calculations.

*1. Determinations of disparity standard compliance under § 222.162(b)(1).*

(a) The determinations of disparity in current expenditures or revenue per pupil are made by—

(i) Ranking all LEAs having similar grade levels within the State on the basis of current expenditures or revenue per pupil for the second preceding fiscal year before the year of determination;

(ii) Identifying those LEAs in each ranking that fall at the 95th and 5th percentiles of the total number of pupils in attendance in the schools of those LEAs; and

(iii) Subtracting the lower current expenditure or revenue per pupil figure from the higher for those

agencies identified in paragraph (ii) and dividing the difference by the lower figure.

*Example*: In State X, after ranking all LEAs organized on a grade 9-12 basis in order of the expenditures per pupil for the fiscal year in question, it is ascertained by counting the number of pupils in attendance in those agencies in ascending order of expenditure that the 5th percentile of student population is reached at LEA A with a per pupil expenditure of $ 820, and that the 95th percentile of student population is reached at LEA B with a per pupil expenditure of $1,000. The percentage disparity between the 95th and 5th percentile LEAs is 22 percent ($1,000-$820 = $180/$820). The program would meet the disparity standard for fiscal years before fiscal year 1998 but would not for subsequent years.

(b) In cases under § 222.162(b), where separate computations are made for different groups of LEAs, the disparity percentage for each group is obtained in the manner described in paragraph (a) above. Then the weighted average disparity percentage for the State as a whole is determined by—

(i) Multiplying the disparity percentage for each group by the total number of pupils receiving free public education in the schools in that group;

(ii) Summing the figures obtained in paragraph (b)(I); and

(iii) Dividing the sum obtained in paragraph (b)(ii) by the total number of pupils for all the groups.

EXAMPLE

| | |
|---|---|
| Group 1 (grades 1-6), 80,000 pupils x 18.00% | =14,400 |
| Group 2 (grades 7-12), 100,000 pupils x 22.00% | =22,000 |
| Group 3 (grades 1-12), 20,000 pupils x 35.00% | = 7,000 |
| Total 200,000 pupils | 43,400 |
| 43,400/200,000 = 21.70% Disparity | |

*2. Determinations under § 222.163(b) as to maximum proportion of payments under the Act that may be taken into consideration by a State under an equalization program.* The proportion that local tax revenues covered under a State equalization program are of total local tax revenues for a particular LEA shall be obtained by dividing: (a) The amount of local tax revenues covered under the equalization program by (b) the total local tax revenues attributable to current expenditures within the LEA. Local revenues that can be excluded from the proportion computation are those received from local non-tax sources such as interest, bake sales, gifts, donations, and in-kind contributions.

*Examples*

*Example 1.* State A has an equalization program under which each LEA is guaranteed $900 per pupil less the LEA contribution based on a uniform tax levy. The LEA contribution from the uniform tax levy is considered under the equalization program. LEA X contributes the proceeds of the uniform tax levy, $700 per pupil, and the State contributes the $200 difference. No other local tax revenues are applied to current expenditures for education by LEA X. The percentage of funds under the Act that may be taken into consideration by State A for LEA X is 100 percent

($700/$700). If LEA X receives $100 per pupil in payments under the Act, $100 per pupil may be taken into consideration by State A in determining LEA X's relative financial resources and needs under the program. LEA X is regarded as contributing $800 and State A would now contribute the $100 difference.

*Example 2.* The initial facts are the same as in Example 1, except that LEA X, under a permissible additional levy outside the equalization program, raises an additional $100 per pupil not covered under the equalization program. The permissible levy is not included in local tax revenues covered under the equalization program but it is included in total local tax revenues. The percentage of payments under the Act that may be taken into consideration is 87.5 percent ($700/$800). If LEA X receives $100 per pupil in payments under the Act, $87.50 per pupil may be taken into consideration. LEA X is now regarded as contributing $787.50 per pupil under the program and State A would now contribute $112.50 per pupil as the difference.

*Example 3.* State B has an equalization program under which each LEA is guaranteed $900 per pupil for contributing the equivalent of a two mill tax levy. LEA X contributes $700 per pupil from a two mill tax levy and an additional $500 per pupil from local interest, bake sales, in-kind contributions, and other non-tax local sources. The percentage of funds under the Act that may be taken into consideration by State A for LEA X is 100 percent ($700/$700). The local revenue received from interest, bake sales, in-kind contributions and other non-tax local revenues are excluded from the computation since they are from non-tax sources. If LEA X receives $100 per pupil in payments under the Act, $100 per pupil may be taken into consideration by State A in determining LEA X's relative

financial resources and needs under the program. LEA X is regarded as contributing $800 and State A would now contribute the $100 difference.

*Example 4.* State C has an equalization program in which each participating LEA is guaranteed a certain per pupil revenue at various levels of tax rates. For an eight mill rate the guarantee is $500, for nine mills $550, for 10 mills $600. LEA X levies a 10 mill rate and realizes $300 per pupil. Furthermore, it levies an additional 10 mills under a local leeway option realizing another $300 per pupil. The $300 proceeds of the local leeway option are not included in local tax revenues covered under the equalization program, but they are included in total local tax revenues. The percentage of payments under the Act that may be taken into consideration is 50 percent ($300/$600). If LEA X receives $100 per pupil in payments under the Act, $50 per pupil may be taken into consideration. LEA X may be regarded as contributing $350 per pupil under the program and State B would now contribute $250 as the difference.

*Example 5.* The initial facts are the same as in Example 4, except that LEA Y in State C, while taxing at the same 10 mill rate for both the equalization program and leeway allowance as LEA X, realizes $550 per pupil for each tax. As with LEA X, the percentage of payments under the Act that may be taken into consideration for LEA Y is 50 percent (550/1100). If LEA Y receives $150 per pupil in payments under the Act, then up to $75 per pupil normally could be taken into consideration. However, since LEA Y would have received only $50 per pupil in State aid, only $50 of the allowable $75 could be taken into consideration. Thus, LEA Z may be regarded as contributing $600 per pupil under the program and State B would not contribute any State aid.

## Former 34 C.F.R. 222.63 (1993)

### § 222.63 Disparity standard

(a) *25 percent disparity limitation.* The Secretary will consider a program of State aid to have fulfilled the requirement of § 222.62(d) of this subpart if the disparity in the amount of current expenditures or revenue per pupil for free public education among local educational agencies in the State is no more than 25 percent for the fiscal year for which a determination is made under this subpart. The method for calculating the percentage of that disparity in a State is set out in the appendix to this subpart.

(b)(1) *Weighted average disparity for different grade level groups.* If a State requests it, the Secretary will make separate disparity computations for different groups of local educational agencies in the State which have similar grade levels of instruction.

(2) In those cases, the weighted average disparity, based on the proportionate number of pupils in each group, may not be more than 25 percent for all the groups. The method for calculating the weighted average disparity percentage is set out in the appendix to this subpart

(c) *Per pupil figure computations.* In calculating the current expenditures or revenue disparities under this section, computations of per pupil figures are made on the following bases:

(1) Except as provided in paragraph (c)(2) of this section, the per pupil amount of current expenditures or revenue for a local educational agency is computed on the basis of the total number of pupils receiving free public

education in the schools of the agency. The total number of pupils is determined in accordance with whatever standard measurement of pupil count is used in the State.

(2) If a State aid program uses a "weighted pupil," a "classroom," "instructional unit," or other designated unit of need in determining allocations of State aid in order to take account of special cost differentials, the computation of per pupil revenue or current expenditures may be made on those bases. There are two allowable categories of special cost differentials: (i) Those associated with pupils having special educational needs, such as handicapped children, economically disadvantaged children, non-English speaking children, and gifted and talented children; and (ii) those associated with sparsity or density of population, cost of living, or special socioeconomic characteristics within the area served by an agency.

(d) *Revenues and current expenditures included in determinations.* The following revenues or current expenditures must be included for each local educational agency in the State in determining the percentage of disparity under paragraph (a) of this section:

(1) All revenues or current expenditures from State sources, except those applied or contributed outside any equalized part of the State aid program which are designated for special cost differentials of the type specified in paragraph (c)(2) of this section.

(2) All revenues for current expenditures from local or intermediate sources, except those taken into consideration under any equalized part of the State aid program which are designated for special cost differentials of the type specified in paragraph (c)(2) of this section.

(3) Pub. L. 81-874 funds received by the agency under sections 2, 3 and 4 of the Act, except to the extent that (i) they are not taken into consideration under the State aid program, and (ii) they exceed the proportion of those funds that the State would be allowed to take into consideration under § 222.66 of this subpart; and

(4) Any other Federal funds received by the agency for which the agency is not accountable to the Federal Government for their use such as Federal Forest Reserve funds (16 U.S.C. 500).

(Authority: 20 U.S.C. 240(d)(2))

[42 FR 15546, Mar. 22, 1977. Re-designated at 45 FR 77368, Nov. 21. 1980, and amended at 54 FR 37257, Sept. 7. 1989]

**Appendix to former 34 C.F.R. Part 222 (1993).**

APPENDIX TO PART 222

[Pub. L. 81-874, Section 5(d)]

ASSISTANCE FOR LOCAL EDUCATIONAL AGENCIES IN AREAS AFFECTED BY FEDERAL ACTIVITIES; METHODS OF CALCULATIONS FOR TREATMENT OF PAYMENT UNDER STATE EQUALIZATION PROGRAMS

The following paragraphs described the methods for making certain calculations in conjunction with determinations made under various requirements of the regulations set forth in this subpart. These methods shall be the only methods used in making these calculations.

1. *Determinations of disparity standard compliance under § 222. 63(b)(1).*

The determination of disparity in current expenditures or revenue per pupil is made by:

(a) Ranking all local educational agencies having similar grade levels within the State on the basis of current expenditures or revenues per pupil with respect to the fiscal year for which data has been submitted in accordance with these regulations;

(b) Identifying those local agencies in each ranking which fall at the 95th and 5th percentiles of the total number of pupils in attendance in the schools of these agencies; and

(c) Subtracting the lower current expenditure or revenue per pupil figure from the higher for those agencies identified in paragraph (b) and dividing the difference by the lower figure.

*Example:* In state X, after ranking all local educational agencies organized on a grade 9-12 basis in order of the expenditures per pupil for the fiscal year in question, it is ascertained by counting the number of pupils in attendance in these agencies in ascending order of expenditure that the 5th percentile of student population is reached at LEA A with a per pupil expenditure of $820, and that the 95th percentile of student population is reached at LEA B with a per pupil expenditure of $1000. The percentage disparity between the 95th and 5th local educational agencies is 22 percent ($1000-$820-$180÷$820). The program would be deemed to qualify.

(d) In cases under § 222.63(b), where separate computations are made for different groups of local educational agencies, the disparity percentage for each group is obtained in the manner described in paragraphs (a), (b) and (c) above. Then the weighted average disparity percentage as for the State as a whole is determined by:

(i) Multiplying the disparity percentage for each group by the total number of pupils receiving free public education in the schools in that group;

(ii) Summing the figures obtained in (i); and

(iii) Dividing the sum obtained in (ii) by the total number of pupils for all the groups.

*Example:* For State Y three groups of local educational agencies were considered, Group No. 1 (grades 1-6) had a disparity percentage of 18 percent and 80,000 pupils. Group No. 2 (grades 7-12) had a disparity percentage of 22 percent and 100,000 pupils. Group No. 3 (grades 1-12) had a disparity percentage of 35 percent and 20,000 pupils. The figure obtained under (i) is 14,400 for group No. 1, 22,000 for group No. 2, and 7000 for group No. 3. The sum of these figures under (ii) is 43,400. Dividing that number by the total number of pupils for all three groups (200,000) gives a weighted average percentage of 21.7 percent. State Y meets the requirement of § 222.63(b).

2. *Determination under § 222.63(b) as to maximum proportion of Pub. L. 81-374 payments that may be taken into consideration by a State under an equalization program.* The proportion that local revenues covered under a State equalization program are of total local revenues for a

particular local educational agency shall be obtained by dividing: (a) the amount of local revenues covered under the equalization program by (b) the total local revenues attributable to current education within the agency.

*Examples.*

*Example 1.* State A has an equalization program under which each LEA is guaranteed $900 per pupil less the LEA contribution based on a uniform tax levy. LEA X contributes $700 per pupil and the State contributes the $200 difference. No other local revenues are applied to current expenditures for education by LEA X. The percentage of funds under the Act which may be taken into consideration by State A for LEA X is 100% (700/700). If LEA X receives $100 per pupil in Pub. L. 81-874 funds. $100 per pupil may be taken into consideration by State A in determining LEA X's relative financial resources and needs under the program. LEA X is regarded as contributing $800 and State A would now contribute the $100 difference.

*Example 2.* The initial facts are the same as in Example 1, except that LEA X, under a permissible additional levy outside the equalization program, raises an additional $100 per pupil. The percentage of Pub. L. 81-874 funds which may be taken into consideration is 87.5% (700/800). If LEA X receives $100 per pupil in Pub. L. 81-874 funds, $87.50 per pupil may be taken into consideration. LEA X is now regarded as contributing $787.50 per pupil under the program and State A would now Contribute $112.50 per pupil as the difference.

*Example 3.* State B has an equalization program in which each participating LEA is guaranteed a certain per pupil revenue at various levels of tax rates. For an 8 mill rate the

guarantee is $500, for 9 mills $550, for 10 mills $600. LEA Y levies a 10 mill rate and realizes $300 per pupil. Furthermore, it levies an additional 10 mills under a local leeway option, realizing another $300 per pupil. The percentage of Pub. L. 81-874 which may be taken into consideration is 50% (300/600). If LEA Y receives $100 per pupil in Pub. L. 81-874 funds, $50 per pupil may be taken into consideration. LEA Y may be regarded as contributing $350 per pupil under the program and State B would not contribute $250 as the difference.

*Example 4.* The initial facts are the same as in Example 3, except that LEA Z in State B, while taxing at the same 10 mill rate for both the equalization program and leeway allowance as LEA Y, realizes $550 per pupil for each tax. As with LEA Y, the Percentage of Pub. L. 81-874 funds which may be taken into consideration for LEA Z is 50% (550/1100). If LEA Z receives $150 per pupil in Pub. L. 81-874 funds, then up to $75 per pupil normally could be taken into consideration. However, since LEA Z would have received only $50 per pupil in State aid, only $50 on the allowable $75 could be taken into consideration. Thus, LEA Z may be regarded as contributing $600 per pupil under the program and State B would not contribute any State aid.

*Example 5.* The initial facts are the same as in Example 4, except that LEA Z realizes $600 per pupil from each of the 10 mill taxes. Since LEA Z is regarded as contributing $600 to the equalization program and receives no State aid, no Pub. L. 81-874 funds are taken into consideration under the program.

*3. Examples of wealth neutrality calculations under § 222.64.*

*Example 1.* State A has an equalization program under which each LEA is guaranteed $900 per pupil less the LEA contribution derived from a uniform required tax of 20 mills.

A minimum of $100 per pupil in paid even if the required tax produces more than $900. Each LEA is permitted to levy additional local taxes. Additional categorical State aid is made available for special cost programs. The State has no limitations on budget, expenditure or local tax effort increases. The State is composed of three LEA's with data as shown.

| | LEA No. 1 | LEA No. 2 | LEA No. 3 |
|---|---|---|---|
| Taxable wealth per pupil | $30,000 | $60,000 | $20,000 |
| Enrollment | 2,000 | 1,000 | 1,000 |
| Yield per pupil from required local tax | $600 | $1,200 | $400 |
| Equalized State aid per pupil | 300 | 100 | 500 |
| Additional local tax per pupil | 100 | 300 | 70 |
| Additional State aid per pupil | 160 | 150 | 155 |
| Total State, intermediate, and local revenues per pupil | 1,160 | 1,750 | 1,125 |

LEA No. 1

The $600 per pupil derived from the required local tax rate and the $300 per pupil in State equalization aid are

neutral since $900 per pupil was the least amount realized by any LEA for the same required tax effort. One third of the $100 per pupil from the additional local tax is not neutral since the least wealthy LEA, #3, could only realize two-third of the revenue that LEA #1 could at the same tax rate. The $160 per pupil of State categorical aid is neutral. Thus, $1,127 per pupil ($600+$300+ ⅔ of $100+$160) is wealth neutral and $33 per pupil is not neutral.

LEA No. 2

Of the $1,200 per pupil derived from local required effort $900 is neutral since that was the least amount realized by any LEA for the required local tax rate. The $300 per pupil above the guarantee and the $100 per pupil minimum State equalization aid are not neutral since they exceed the least amount realized by another agency. Two-thirds of the $300 per pupil realized on the additional local tax, $200, is not neutral since the least wealthy, LEA #3, could only realize one-third of the revenue that LEA #2 could at the same rate. The $150 per pupil of State categorical aid is neutral. Thus, $1,150 per pupil ($900+ ⅓ of $300+$150) is wealth neutral and $600 per pupil is not neutral.

LEA No. 3

The $400 per pupil derived from the required local tax rate and the $500 per pupil in State equalization aid are neutral since $900 is the least amount realized under the equalization program. All of the $70 per pupil realized from the additional local tax is neutral since LEA #3 is the least wealthy in the State. The $155 per pupil of State categorical aid is neutral. Thus, all of the $1,125 per pupil is neutral.

The calculation of the percentage of wealth neutral funds

for State A is as follows:

---

LEA No. 1 - Total revenues

| Neutral | Not Neutral |
|---|---|
| $1,127 per pupil | $33 per pupil |
| x2,000 pupils | x2,000 pupils |
| $2,254,000 | $66,000 |

---

LEA No. 2 - Total revenues

| Neutral | Not Neutral |
|---|---|
| $1,150 per pupil | $600 per pupil |
| x1,000 pupils | x1,000 pupils |
| $1,150,000 | $600,000 |

---

LEA No. 3 - Total revenues

| | |
|---|---|
| $1,125 per pupil | None |
| x1,000 pupils | |
| $1,125,000 | |

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Total neutral revenues $4,529,000
Total State, intermediate, and local revenues $5,195,000

= 87.2 pct neutral

Thus, State A qualifies under § 222.64(a).

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*Example 2.* State B in the prior year had an equalization program which required a 5 mill effort and allowed 5 mills additional leeway. For the required 5 mill effort each LEA was guaranteed $600 per pupil. LEA 2, on a wealth base of $60,000 per pupil, levied the full 10 mills producing $300 per pupil received $300 per pupil of State basic aid, and with the $300 per pupil leeway yield, had revenues of $900 per pupil. LEA #2, on a wealth base of $160,000 per pupil, also levied the full 10 mills producing $800 per pupil from the required 5 mills which exceed the guarantee and thus received no State basic aid. The 5 mill leeway yielded an additional $800 per pupil for a total of $1,600 per pupil.

The State has instituted a new program raising the guarantee to $900 per pupil with a 10 percent budget increase limitation. LEA #1, (with 2,000 pupils), now realizes $300 per pupil from its required effort, receives $600 of State basic aid, received $300 per pupil 1.5 mills of local leeway for a yield of $90 per child because of its budget restraint of $990 per child. ($900 per child plus 10 percent), LEA #2 (with 1,000 pupils), realizes $800 per pupil from its required effort, receives $100 per pupil in State equalization aid, levies 5 mills leeway for another $800 per pupil for a total of $1,700 per pupil which is still within its budget increase limitation of $1,760 per pupil.

Assuming that no other LEA is restrained below the $900 per pupil guarantee and that LEA #1 is the most restrained at $90 per pupil leeway then all of the revenues of LEA #2 above that level are not neutral.

The percentage of neutrality for the State is calculated in the same way as in Example 1. Assuming there are no other LEA's, the percentage of wealth neutral revenues is 80.7, and

State B does not qualify.

*Example* 3. State C has an equalization program under which each LEA is guaranteed $900 per weighted pupil or 110 percent of the prior year's per weighted pupil revenue under the program, whichever is less, minus the LEA contribution derived from a required tax which is uniform for all LEA's guaranteed $900 per pupil and proportionately less lot those LEA's guaranteed lesser amounts per pupil. No additional local leeway taxes are allowed. LEA #1 received $850 per pupil under the program in the prior year while LEA #2 received $800 per pupil under the program in the prior year. LEA #1 is limited to the $900 guarantee since 110 percent of its prior year's expenditure exceeds the $900 guarantee. LEA #2 qualifies for an $880 guarantee since 110 percent of $800 equals $880. LEA #2's required tax effort is also proportionately less.

Assume that neither LEA realizes revenues in excess of the guarantee. For LEA #1 (with 10,000 pupils), $880 of the $900 per pupil revenue is wealth neutral and for LEA #2 (with 2,000 pupils), all $880 in per pupil revenue is wealth neutral. (See § 222.64(b)(2)(iii)).

The percentage of neutrality for the State would be calculated as in Example 1. The percentage of wealth neutral revenues is 98.2 and the State qualifies under § 222.64(a).

*Example 4.* State D has an equalization program which permits different local tax efforts from 1 mill to 10 mills and which guarantees $100 per pupil for each mill levied. LEA #1 taxes at 5 mills and realizes $300 per pupil. Since the guarantee level for 5 mills is $500 per pupil, State D gives LEA #1 $200 in equalization aid. LEA #2 also taxes at 5 mills, but realizes $800 per pupil. Since the guarantee for 5

mills is only $500 per pupil, LEA #2 receives no equalization aid. LEA #3 taxes at 8 mills and realizes $400 per pupil. Since the guarantee at 8 mills is $800 per pupil. LEA #3 receives $400 in equalization aid. LEA #4 taxes at 8 mills, and realizes $1,000 per pupil. Since the guarantee for 8 mills is only $800 per pupil, LEA #4 receives no equalization aid. All of the funds LEA #1 realized under the equalization program are neutral since there is no excess over the guaranteed amount for 5 mills. $300 per pupil of the funds realized by LEA #2 are not neutral, because that is the amount in excess of the amount guaranteed for a 5 mill tax effort under the equalization program, and is attributable to the greater wealth of LEA #2.

All of the funds realized by LEA #3 under the equalization program are neutral since there is no excess over the guaranteed amount for an 8 mill tax effort, $200 per pupil realized by LEA #4 is not neutral, because that is the amount in excess of the guaranteed amount for an 8 mill tax effort under the equalization program and is attributable to the greater wealth of LEA #4.

*Example 5.* State E has a foundation-type equalization program under which each LEA receives funds for a teacher salary, based on a salary schedule, for each 25 pupils in average daily attendance with additional teacher units allocated for small or sparsely populated districts, and special education programs such as handicapped and vocational classes. Each district also receives under the program a set amount of dollars per teacher unit for expenses other than salaries. Each LEA must make a tax effort of 10 mills to qualify for the foundation equalization aid. The yield from the 10 mills tax is deducted from the amount of the equalization guarantee. There are no State restrictions on budget, expenditure or tax effort increases over prior years.

No LEA in the State realizes more than the guaranteed amount for the 10 mill effort. All of the funds realized by all LEAs under the foundation equalization program are neutral. Any excess in the amount of revenues realized by any agency over that realized by any other are attributable to differences in the designated needs. (See § 222.61(b)(3)).

4. *Determination under § 222. 66 as to maximum proportion of Pub. L. 31-874 payments that may be taken into consideration by a State under an equalization program.*

[40 FR 16032, Apr. 8. 1975, as amended at 42 FR 65526, Dec. 30. 1977. Re-designated at 45 FR 77368, Nov. 21, 1980]

FEDERAL REGISTER

FRIDAY, JUNE 25, 1976

Part II: DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of Education

# SCHOOL ASSISTANCE IN FEDERALLY AFFECTED AREAS (IMPACT AID)

## Title 45—Public Welfare

## CHAPTER 1—OFFICE OF EDUCATION, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

## PART 115—ASSISTANCE FOR LOCAL EDUCATIONAL AGENCIES IN AREAS AFFECTED BY FEDERAL ACTIVITIES AND ARRANGEMENTS FOR EDUCATION OF CHILDREN WHERE LOCAL EDUCATIONAL AGENCIES CANNOT PROVIDE SUITABLE FREE PUBLIC EDUCATION

### Interim Regulations for Treatment of Payments Under State Equalization Programs

A Notice of proposed rulemaking was published in the FEDERAL REGISTER on May 1, 1975 (40 FR 19114) setting forth proposed regulations for the treatment of Pub. L. 81-874 payments under State equalization programs as provided for in section 5(d)(3) of that Act for Fiscal Year 1975, and in section 5(d)(2) of that Act for Fiscal Year 1976 and

thereafter. Interested persons were given 30 days in which to submit written comments, suggestions, or objections regarding the proposed regulations.

As a result of such comments, interim regulations are being published, as set for below, to enable further public comments, suggestions, and recommendations. These interim regulations, when they become effective in accordance with section 431(d) of the General Education Provisions Act (20 U.S.C. 1232(d)), will govern determinations made under section 5(d), Publ L. 81-874, until final regulations are published and become effective.

Elsewhere in this issue of the FEDERAL REGISTER, these regulations have been incorporated by reference into a notice of proposed rulemaking related to section 5(d), Pub. L. 81-874. That notice proposes an amendment to § 115.62 of these interim regulations. Interested parties are invited to submit written comments, suggestions, or objections to the Office of Education, Division of School Assistance in federally Affected Areas, Room 2107, FOB-6, 400 Maryland Avenue, S.W., Washington, D.C. 20202. All relevant material received on or before July 26, 1976, will be considered. Comments submitted in writing will be available for review in the above office between the hours of 8:30 a.m. and 4:30 p.m. Monday through Friday.

## A. SUMMARY OF STATUTORY AMENDMENT AND FINAL REGULATIONS

1. *Effect of Pub. L. 93-380.* Sections 304(c) (effective for Fiscal Year 1976 and thereafter) of Pub. L. 93-380 have amended section 5(d) of Pub. L. 81-874 to permit States to take into account payments under Title I of that Act in determining the relative financial resources available to local

educational agencies and relative financial need of those agencies if the State has in effect a program of State aid for free public education designed to equalize expenditures among local educational agencies in the State. However, Pub. L. 81-874 payments may be so taken into account only in the proportion that local revenues covered by those programs are of total revenues for education.

As mandated by the statute, these regulations implement the amendments to Pub. L. 81-874 by establishing standards for determining whether a State has in effect such a program, by defining certain terms, by establishing procedures for determinations pursuant to section 5(d)(2), and by setting forth the procedure for a hearing regarding those determinations.

2. *General rules.* Under § 115.61(b)(1), only a State whose program of State aid meets the standards set forth in § 115.62 may be excepted from the operation of section 5(d)(1) of the Act. However, these States may take into consideration only the proportion of Pub. L. 81-874 funds as permitted under § 115.63. In light of the many recent cases in State courts concerning the validity of State systems of school finance, § 115.61(b)(2) states that no State aid programs may qualify under these regulations if a State court has ruled that such a program violates law and the final ruling is not under appeal.

3. *Definitions.* Four terms have been defined: "State aid," "equalize expenditures," "current expenditures," and "revenue." The second of the foregoing is defined by reference to other sections of the regulations which set forth the qualifying standards for equalization programs.

4. *Qualifying standards.* Section 115.62 establishes

standards under which the Commissioner shall determine, for purposes of section 5(d)(2) of the Act, whether a State has a program of State aid designed to equalize expenditures among local educational agencies within that State. These standards have been developed in light of the legislative history of section 5(d) of the Act, which indicates that the Commissioner should promulgate regulations which afford only a limited and carefully constructed exception to the existing rule under section 5(d). (See, for example, the *Congressional Record*, daily edition, May 20, 1974, S 8607 and July 31, 1974, H 7401, 7412. Further reliance has been made upon: House Report No. 93-805, pages 42-43; Senate Report No 93-763, pages 55-56; Senate Report No. 93-1026, pages 162-163; and statements in the *Congressional Record* of March 27, 1974 at H 2228-2233, May 20, 1974 at S 8502-8505, 8604-8608, July 24, 1974 at S 13384, and July 31, 1974 at H 7396, 7401, and 7412.) In particular, the House Committee on Education and Labor print, *Public Law 874 and State Equalization Plans* (March 1974), specifically mentioned in House Report 93-805, has been used as a reference in establishing the evaluative standards.

Any State aid program in effect which apportions payments on a relative shared-cost basis among local educational agencies in the State will be considered an equalization type of program to which these regulations may be applied. An initial test of equalization effect of the program in terms of equalizing expenditures is then applied under § 115.62(b) by means of a disparity standard. If there is a disparity of no more than 25 per cent in revenues per pupil (or other unit of pupil need used in the State program) available ro the 95th and 5th percentile school districts (those with the 95th and 5th percentiles of the total number of pupils after being ranked in order of revenue per pupil), the program would be deemed to qualify under section 5(d)(2). A

disparity standard has been chosen because it is a method of evaluating school finance programs in terms of equalization that has been used both by the courts and authorities in the field of school finance, and because it is believed that the phrase "equalize expenditures" focuses upon the relative availability of funds to local educational agencies for educating the children within their school systems. "Revenue" data, as well as "expenditure" data is used because revenues generally reflect the amount of funds available for expenditure in a school district and because revenue data is more accessible for current fiscal year evaluation. In calculating the disparity, revenues or expenditures attributable to capital outlay or debt service are to be excluded. It is felt that such expenditures should not included because Pub L, 87-874 is a current expenditures program and capital expenditures are likely to fluctuate considerably from year to year. The exclusion of the upper and bottom 5 percentile school districts is based upon the accepted principle of statistical evaluation that such percentiles usually represent unique or noncharacteristic situations.

As discussed further below, a number of comments were received to the effect that a disparity standard alone did not give sufficient recognition to equalization programs based on principles of "fiscal neutrality". After due consideration, it was decided that a properly constructed standard could effectively measure programs emphasizing "fiscal neutrality" within the framework of "equalize expenditures" and should be incorporated into the regulation. This would complement the disparity standard already discussed in keeping with the intent expressed in Senate Report No. 93-763 (1974) that the Commissioner be flexible as to recognizing the types of equalization programs utilized by States. However, since a "fiscal neutrality" standard was not contained in the proposed

regulations published May 1, 1975, it has been deemed necessary to publish such an amendment as a proposed rule subject to public comment. Therefore, concurrently with the publication of these interim regulations, the commissioner is publishing a notice of proposed rulemaking encompassing the addition of a "fiscal neutrality" standard as a qualifying standard under this subpart. Of course, that additional regulation will not become effective until after it is published as a final regulation.

An exception clause in § 115.62(c) provides that State programs which do not meet the above disparity test may still be considered for the exemption if certain other conditions are fulfilled. This clause then provides for a determination by the Commissioner in reference to specified evaluative criteria. These criteria, while judgmental in nature, have been selected as reasonable parameters of a truly equalizing State aid program. Consideration under this clause is further conditioned upon the requirement that educational expenditures be more equalized within a State as a result of any offsetting of Pub. L. 81-874 payments.

It is further provided that, in applying the standards for qualification as an equalization program, disparities with respect to revenue per pupil in a State which are attributable to special education services shall not be considered in an adverse manner, so as to prevent a State program from qualifying. This exclusive treatment of special education costs is mandated by the statutory amendment.

5. *Proportionality determination.* Under this amendment to section 5(d), a State is limited as to how much of Pub. L. 81-874 payments going to a school district may be taken into consideration. Section 115.63 sets forth the statutory formula for determining what proportion local revenues under a State

equalization program are of total local revenues for education. The amendments to section 5(d) prohibit a State from taking Pub. L. 81-874 payments into account in excess of this proportion. The phrase "local revenues covered under a State equalization program: and "total local revenues" are clarified in the regulation to distinguish among various current expenditure revenues a school district might receive.

6. *Assurances*. A number of assurances are required of both State and local educational agencies with regard to the taking into consideration of Pub. L. 81-874 payments under a State aid program. Under § 115.64, a local educational agency will be required to insure that the State in which it is situated is acting in compliance with section 5(d) of the Act as regards that a ency. A State educational agency will be required to assure that it is acting in conformity with section 5(d) of the Act and these regulations, and that the State will restore to a school district any State aid not paid because of consideration of Pub. L. 81-874 payments not actually received. A failure on the part of either agency to provide these assurances will cause determination proceedings to be initiated under this subpart, but will not itself require suspension of payments under the Act.

7. *Determination procedures*. Provision is made in § 115.65 for proceedings to obtain determinations by the Commissioner under section 5(d)(2) at the initiation of an affected State or local educational agency or at the initiation of the Office of Education. Where the State educational agency, for example, desires an authoritative determination by the Commissioner whether and the extent to which section 5(d) permits it to take into consideration Pub. L. 81-874 payments in determining State aid, it may file with the Office of Education a submission seeking a determination. Also, where a local educational agency is adversely affected by a

State taking into consideration Pub. L. 81-874 payments, it may seek a determination as to the status of such a State practice under section 5(d). The adverse effect contemplated in this case would be the loss of State aid monies which the local agency would have received but for the State's action. (In such a situation, the concerned State agency would, of course, be asked to respond). Finally, the Office of Education itself, where it believes that a State may be acting in noncompliance with section 5(d), may initiate proceedings leading to an appropriate determination. Determinations ill be applicable only for the fiscal years in issue.

At the same time, the regulation provides that a determination by the Office of Education that taking into consideration Pub. L 81-874 payments under section 5(d)(2) is authorized would not have to be obtained before a State could commence such an action, if it were done in compliance with section 5(d)(2). For example, if a State, since the effective date of section 5(d)(2) , has been taking into consideration these payments under a State equalization program which qualifies under section 5(d)(2) and the regulations, and this State action is in the appropriate proportion for each local educational agency in the State, the fact that a determination by the Commissioner on the legality of this practice was not obtained in advance would not defeat the operation of section 5(d)(2) in providing an exception for the State. This rule, however, would not preclude the Commissioner from determining that a State had been in noncompliance with section 5(d)(2) during the time it acted without an advance determination.

In addition, provision is made for advance consultation with the Office of Education for States contemplating the adoption of equalization programs which would take into consideration Pub. L. 81-874 payments.

8. *Hearing procedures*. Section 115.66 establishes what parties may request a hearing, the time and place of hearings, the right to counsel for all parties, the conduct of the hearing, and the procedure for a final decision by the Commissioner. It further provides that there shall be no reduction or termination of Pub. L. 81-874 payments prior to a final decision and that, if a State which is found to be in noncompliance will cease and desist in its improper action and will make appropriate restitution to any local educational agency adversely affected by such an action, there will be no reduction or termination of Pub. L. 81-874 payments.

9. *Appendix*. An appendix has been added to these regulations setting forth the two different methods for making certain computational determinations established under these regulations. The first concerns disparity determinations under § 115.62(b)(1), and the second, determinations under § 115.63(b) of the maximum proportion of such payments which may be taken into consideration by a State. Each description of the method for making the appropriate computations is accompanied by one or more illustrative examples.

## B. Summary of Comments, Responses and Changes in the Regulations

The major issues which were the focus of the comments submitted concerned the use of the "disparity" standard as the initial determinant of qualification of a State equalization program, the absence of a qualifying standard more specifically addressed to the purposes of so-called "power equalizing" programs, the exclusion of expenditures or revenues from capital outlays and debt service from "disparity" determinations, and the lack of definitiveness in the criteria set forth for in-depth examinations of State

programs not meeting the initial standards. Those who objected to the use of a "disparity" standard generally did so on the grounds that it was beyond the scope of the statutory amendments and too restrictive. As discussed below in response to the specific comments, it is clear that the Commissioner is required to develop an evaluative standard for selecting qualifying programs and that considerations of disparities between expenditures levels is one of several recognized equalization measures. While the standard is somewhat restrictive, it was established because of Congressional intent that the statutory amendment was to provide a narrow exception to the basic prohibition against taking Pub. L. 81-874 payments into consideration in the distribution of State aid to school districts. Through public comment, it has been advocated that the Commissioner adopt a "fiscal neutrality" standard which recognizes the so-called "power equalizing" programs. As discussed below, there is not sufficient information on the appropriateness of such a standard for this regulation to permit a positive response to that comment. The exclusion of expenditures for capital outlays and debt service is based on the random and fluctuating effect those expenditures would have on an evaluation of equalization and the fact that Pub. L. 81-874 is focused on maintenance and operation expenditures. While the evaluative criteria set forth in § 115.62(c)(3) for an "in-depth" examination of a State's equalization program are not capable of being reduced to numerical absolutes, they do provide a relative framework within which a determination can be made and are based on evaluative considerations utilized by experts in the field of school finance equalization. The above comments as well as others of a more technical nature which were submitted to the Office of Education are discussed below on an individual basis. After the summary of each comment, a response is set forth stating changes which have been made to the regulations in light of the

comment, or the reasons why no change is deemed necessary. The comments are in order of general comments followed by those related to particular sections of the interim regulations.

1. *Comment*. Two commenters expressed general opposition to the exception to the general prohibition against consideration of Pub. L. 81-874 payments in allocation of State aid provided by section 5(d)(2) of Pub. L. 81-874 (Section 5(d)(3) of the Act for Fiscal Year 1975), while three commenters expressed general approval of the provision.

*Response*. No change has been made in the regulations in response to the comments. The Commissioner takes note of these views and makes them known to the public. However, the purpose of this rulemaking is to implement the amendment as enacted by Congress, not to alter or question its scope or purpose. It would be beyond the authority of the Commissioner to decline to implement the amendment as mandated by the Congress.

2. *Comment*. One commenter requested that the regulations be amended to prohibit the use of Pub. L. 81-874 payments under the authority of the amendment to section 5(d) of the Act to supplant State equalization aid, which otherwise would have been apportioned to eligible applicants. Under this proposal, a State would be required to redistribute to all local educational agencies, through its State aid program, those funds which would have been made available through the program, but for the offsetting of Pub. L. 81-874 payments.

*Response*. No change has been made in the regulation. Such a requirement would exceed the rulemaking authority of the Commissioner. That limitation would have been incorporated into the statute if Congress had intended it, since

it would have far-reaching consequences for State aid programs. Furthermore, this additional requirement would defeat the plain language of the original section 5(d) and the amendment to it. Section 5(d)(1) of Pub. L. 81-874 (section 5(d)(2) for Fiscal Year 1975) establishes a general supplanting prohibition to which the exception was provided by the legislative amendment on which these regulations are based. The amendment permits divergency from the general prohibition only under well-defined and carefully controlled circumstances, as set forth in these regulations. Not to allow any divergence would defeat the legislative purpose and would interfere with a State's right to choose the level of funding for this State aid program. On the other hand, a State is not precluded from taking the suggested action and it would improve its equalization posture by redistributing the offset funds.

3. *Comment.* Three commenters asked that the regulations be amended to provide a "grandfather clause," through Fiscal Year 1976, for those States to which the so-called "waiver" of section 5(d)(2) of Pub. L. 81-874 under section 11 of Pub. L. 93-150 (School Lunch Act of 1973) was applicable during Fiscal Year 1974. This would effectively excuse those States from noncompliance with these regulations and the statute prior to Fiscal Year 1977.

*Response.* No change has been made in the regulation. Such an amendment to the regulation would be beyond the rule-making authority of the Commissioner. The Commissioner is aware of the administrative difficulties and financial burdens which may be placed on the States and local educational agencies attendant to an application of this regulation during the period in question. However in order to exclude the application of the regulation, it would be necessary to overcome the statutory intent that the prohibition

against State offsetting of Pub. L. 81-874 funds be effective except for those programs which meet the qualifications under the Commissioner's regulations. This can only be done by legislation.

4. *Comment*. Three commenters expressed the opinion that Pub. L. 81-874 payments received by a local educational agency on the basis of children who reside on Indian trust lands should not be subject to the operation of the amendment to section 5(d) of that Act on the grounds that they are "categorical" funds, and that the regulation should be amended accordingly.

*Response*. No change has been made in the regulation. The inclusion of such a provision in the regulation would exceed the rulemaking authority of the Commissioner. There is nothing in the basic statute, the amending legislation, or the legislative history which reflects any Congressional intent that these funds are to be treated as "categorical" in nature or to be excluded from the operation of the amendment. On the contrary, it is clear that they are to be considered as another type of so-called "A" payment. Where Congress has sought to treat certain payments under Pub. L. 81-874 as "categorical" in nature, such as for handicapped children of uniformed services personnel, it has specifically prescribed the uses to which these funds must be put. This has not been done for the payments attributable to children residing on Indian trust lands. This is not to say that the Federal government is unconcerned with the education provided Indian children in these schools. Congress has focused upon the special relationship local educational agencies receiving funds under the Act may have with Indian children, who constitute the vast majority of children residing on Indian lands. In section 5(a)(2) of Pub. L. 81-874, it has been specifically provided that applicants which receive payments

based on children who reside on Indian lands "shall set forth adequate assurance that Indian children will participate on an equitable basis in the school program of the local educational agency." Furthermore, through regulations set forth in 45 CFR 115.14(b), the Commissioner has required that local educational agencies receiving these payments must provide for the participation of the parents of Indian children in the planning and development of educational programs and projects serving these children. Similarly, it is to be noted that Federal financial assistance provided under Pub. L. 81-874 is subject to the provisions of Title IV of the Civil Rights Act of 1964. Thus, it is felt that there is legal protection provided in existing law with respect to the educational rights of Indian children who may be the basis of payments received under Pub. L. 81-874. Moreover, it has been noted that during Congressional debate over the adoption of the amendment to section 5(d), Senator Domenici (New Mexico) raised concerns about the effect the amendment would have on school districts serving Indian lands. It would appear that his concern was based on the assumption that payments based on children residing on Indian lands would be subject to the effect of the amendment. Nothing was said in response to his statement. Without a Congressional enactment specifically excluding payments attributable to these children from the general operation of Pub. L. 81-874, the Commissioner cannot go beyond the existing legal framework of assurances and special provisions.

5. Section 115.61(b) *General rules*.

*Comment*. Three commenters objected to the general rule set forth in § 115.61(b)(2) of the regulation which excludes from qualifications for the exception provided in section 5(d) of the Act any program of State aid which has been finally determined by a State court to fail to equalize expenditures for

free public education among local educational agencies within the State or otherwise violates law. The commenters expressed the view that the provision was too broad, in that it failed to distinguish between rulings that might be based on issues other than equalization and those that are so based, and that the provision was not reasonably related to the purpose of the regulation. Furthermore, it was stated that, if the provision were to remain in the interim regulation, it should be amended to provide that any State system of school finance which has withstood a challenge in court should be deemed as qualifying under the regulation.

*Response.* No change has been made in the regulation. Clearly, if a state system of school finance has been found wanting in either respect by its own State courts it would be unwise for the Commissioner to recognize such a system as a valid program of State aid qualified for the exception implemented by these regulations. Obviously, the program would have to be changed in some respect in order to conform to State requirements, and any determination related to the program would be temporary. The object of this provision is to provide some sore to long-range solution to the problem of Pub. L. 81-874 payments impeding meaningful equalization efforts by States. Determinations of temporary effect would not help in this regard and would add to any confusion about the status of the program of State aid. A State cannot fairly represent its equalization program as valid when its own State courts have found it to be invalid. On the other hand, where a State court has upheld the State school finance system as valid, that court may not have been using the same standards established by this regulation. The Commissioner cannot delegate the responsibility to evaluate programs of State aid as regards their equalization effects to State Judicial officers. The Commissioner must establish national standards for all States desiring to avail themselves

of the exception provided in section 5(d) of Pub. L. 81-874 and apply them uniformly. In refusing to consider programs of State aid which have failed an examination as to their legality of a program in the State courts, the Commissioner is not delegating this responsibility but merely setting forth, as a prerequisite to his examination of these programs, the requirement that the program be valid in its own jurisdiction.

6. Section 115.61(c). *Definitions.*

*Comment.* One commenter objected to the exclusion of contribution of fund capital in food service in the definition of "revenue" as set forth in § 115.61(d)(4) of the regulation.

*Response.* No change has been made in the regulation. The definition of "revenue" used in § 115.61(d)(4) is the standard definition of the term as set forth in *Classifications and Standard terminology for Local and State School systems, 1973, Handbook II, Revised* (National Center for Educational Statistics). Contributions of fund capital in food service and pupil activity funds (which are revolving fund or clearing accounts) are excluded as revenues because these contributions represent equity or capital to those funds.

7. Section 115.62. *Qualifying Programs.*

*Comment.* Three commenters expressed opposition to the establishment of specific standards as set forth in § 115.62(a) and (b) for determining the eligibility of a program of State aid under section 5(d)(3) of the Act. The commenters made the following points: (1) The standards are too restrictive because, at present, only a few States have programs of State aid which will satisfy the standards; (2) The standards are arbitrary and unrelated to the purpose of the statute; and (3) The standards were formulated on the assumption that they

would encourage school finance reform, which is fallacious.

*Response.* The only change is an increase in the "disparity" standard to 25 percent. The standards set forth in this regulation were developed in light of the statutory language and legislative history of the amendment to section 5(d) of Pub. L. 81-874, which clearly direct the Commissioner to promulgate regulations to define those concepts which serve to evaluate programs which may be granted an exemption from existing prohibition contained in that section of the Act. It is necessary to develop specific and uniform standards in order to fulfill that mandate. Any standard which establishes a minimum level of acceptance has the obvious effect of excluding those programs which do not come up to that level. To alleviate any inequitable results of this approach, the Commissioner has specifically provided in § 115.62(c) for further detailed consideration of programs which may not meet the requirements of the "disparity" test in § 115.62(b). The standards are not arbitrary in the sense of being unreasonable. A "disparity" standard of 25 percent is actually less stringent than the expenditure ranges recommended in some school finance literature and by recent major studies of school finance equity. Furthermore, a view that these standards are unrelated to the purpose of the statute is not accepted. A disparity standard was chosen because it is a method of evaluating school finance programs in terms of equalization that has been commonly used both by the courts and authorities in the field of school finance, and because it is believed that the phrase "equalize expenditures" focuses upon the relative amounts of funds available to local educational agencies for educating the children within their school systems. The "disparity" standard was not developed as a tool to force States to undertake school finance reform. This standard was one of the methods of evaluation discussed in the House Committee print "Public Law 874 and State

Equalization Plans," which was incorporated into House Report No. 93-805. In addition, the "disparity" standard was discussed in consultation meetings with States prior to publication of the proposed rule. The general consensus of those meetings was that a "disparity" standard was a legal and reasonable test under these provisions. As stated in § 115.60(b) of these regulations, the purpose of establishing these standards is limited to evaluating programs of State aid in order to determine when consideration by States of Pub. L. 81-874 payments in the distribution of State aid would be appropriate.

*Comment.* One commenter expressed the opinion that § 115.62 should be amended to add an alternative qualifying test which would recognize the principle of fiscal neutrality. This principle is that the availability of financial resources for education in a school district should not depend on the wealth of that district but that of the State as a whole. In other words, the State, through a program of State aid, will offset the lack of wealth available for the support of education in a school district so that the amount of expenditures for education is not governed by the amount of available local wealth.

*Response.* No change has been made in the regulation. However, after extended consideration of the advisability of the suggested amendment, the Commissioner has decided to publish a notice of proposed rulemaking incorporating the principle of fiscal neutrality. This is being published simultaneously with this regulation. It would be improper to make a change of this nature in the interim regulation without prior notice and opportunity for public comment. On the other hand, to withhold publication of the interim regulation until a final decision is reached on the proposed rule would unduly delay the effectiveness of the regulation.

*Comment*. Three commenters proposed that, in lieu of the criteria contained in § 115.62 for qualifying programs, criteria should be developed and applied which would measure the degree of equalization which would pertain if a State were permitted to recognize Pub. L. 81-874 payments as local resources, as compared to the degree of equalization which pertains when it is not permitted.

*Response*. No change has been made in the regulation. The extent to which equalization is improved by permitting States to consider Pub. L. 81-874 payments as local resources is a relevant consideration in implementing legislation which is concerned with the possible ill effects these payments may have on State equalization efforts. Thus, such a consideration has been made part of the more detailed analysis of State programs set forth in § 115.62(c), which applies when a State program is adjudged not to meet the requirements of the threshold "disparity" test in § 115.62(b). However, to make this the sole test of whether a State has a program sufficiently equalizing to merit the exemption from the prohibition against considering these payments as local resources in the distribution of State aid would contravene the statutory framework within which these regulations must be developed. The statute and its legislative history clearly mandates that the Commissioner develop regulations which will measure the effects of State equalization programs upon all local educational agencies within the State, not the effect of granting the exemption applied for. However, it is within the scope of the Commissioner's administrative discretion in promulgating these regulations to include various equity considerations, of which the suggested amendment is one.

*Comment*. Regarding the procedure for calculating the "disparity" standard in § 115.62(b), one commenter was not sure whether pupils or school districts are to be considered

when determining the 95th and 5th percentiles, while two commenters advocated that the 95th and 5th percentile exclusions be based on numbers of school districts and not on number of pupils in excluded school districts. A fourth commenter argued that calculating a disparity between school districts would have the effect of minimizing the real school-by-school disparities in States with small numbers of school districts while exposing those disparities in States with large numbers of districts. The commenter offered an alternative scheme of his own design for calculating a measure of fiscal neutrality. The scheme would incorporate into a single index measures of wealth disparity and percentage of local revenues equalized to allow for considerations of fiscal neutrality based programs.

*Response*. The interim regulation has been rewritten to make it clear that the referenced percentiles are based on number of pupils. Section 115.62(b)(1) provides that in calculating the disparity standard according to procedures set forth in Appendix A, the districts in a State will be ranked on the basis of current expenditures or revenue per pupil, and that those districts which fall about the 95th and below the 5th percentile of those agencies in terms of the number of pupils in attendance in the schools of those agencies will be excluded for purposes of the calculation. The percentiles will be determined on the basis of numbers of pupils and not on the basis of numbers of districts. However, it appears that the proposed regulation may have not been as clearly expressed as desired. In regard to the question of pupils versus districts for the percentiles used in calculating the disparity standard, it is the Commissioner's view that basing an exclusion on numbers of districts would act to apply the disparity standard in an unfair and inconsistent manner among States. The purpose of the exclusion is to eliminate those anomalous characteristics of a distribution of expenditures. In States

with a small number of large districts, an exclusion based on percentage of school districts might exclude from the measure of disparity a substantial percentage of the pupil population in those States. Conversely, in States with large numbers of small districts, such an approach might exclude only an insignificant fraction of the pupil population and would not exclude anomalous characteristics.

The Commissioner agrees with the observation that expenditure disparities are more likely to be exposed in States with large numbers of small districts than in States with relatively few large districts. The commissioner also agrees that school-by-school identification of per pupil expenditure variations would provide a more precise picture of expenditure disparities within a State than would district-by-district comparisons. However, a requirement that expenditure disparities be calculated in such a manner would impose a tremendous data gathering and reporting burden for those States seeking to qualify. The Commissioner feels that the imposition of such a burden would be unfair and administratively unwise. The Commissioner has examined with interest the alternative scheme proposed by the commenter for determining qualifying programs. While the commissioner is not convinced that the proposed scheme should replace the approach as set forth in § 115.62(b) he does see merit in further consideration of the appropriateness of a test of fiscal neutrality as an alternative to the expenditure disparity test. As stated above in paragraph 7, the matter is currently under study.

*Comment.* One commenter recommended that the procedure for calculating expenditure disparities as set forth in § 115.62(b) be amended to require that expenditures be compared on a basic pupil count basis only and not to permit those comparisons to be make on a weighted pupil or other

unit or pupil need basis.

*Response*. No change has been made in the regulation. The statutory amendment which this regulation implements clearly requires that any standard used to define the phrase "equalize expenditures" must not be applied in any manner adverse to a program of State aid which provides for taking into consideration the additional cost of providing free education for particular groups or categories of pupils (see section 5(d)(3)(B) of Pub. L. 81-874—section 5(d)(2)(B) of that Act for Fiscal Year 1976 and thereafter). The so-called "weighted" systems of State aid are considered to be a type of program which does take into consideration these additional costs. Therefore, these regulations may not be applied adversely to those systems by dividing their expenditure levels by basic pupil count.

*Comment*. Two commenters suggested that the disparity standard set forth in § 115.62(b)(1) of this subpart be lowered at 10 percent, while one commenter advocated a 25 percent standard.

*Response*. The regulation has been changed in response to the latter comment. A "disparity" standard was chosen in order to fulfill Congressional intent that the exception provided by the statutory amendment would be a narrow exception to the general prohibition contained in section 5(d) of Pub. L. 81-874, and that the exception would be applied only under carefully controlled circumstances. It is felt that a 25 percent standard will still accomplish these purposes, whereas 10 percent would prove too restrictive under present circumstances. More specifically, a 25 percent standard will permit a degree of flexibility in the "disparity" standard without diminishing the control presently desired over the quality of State programs subject to approval under these

regulations.

*Comment.* One commenter expressed concern over the provision contained in § 115.62(b)(3) which requires Federal funds to be included in the computation of the expenditure disparity to the extent that these funds are taken into consideration by a State under a State aid program conforming to the requirements of section 5(d)(3) of the Act (section 5(d)(2) for Fiscal Year 1976 and thereafter). The commenter was concerned that the effect of this provision might be to reflect a higher expenditure disparity in a State than if Federal funds were completely excluded from the calculation.

*Response.* No change has been made in the regulation. The provision was deemed necessary in order that the Commissioner would know exactly how the State program is designed to operate, with payments under Pub. L. 81-874 being taken into consideration. If by some peculiarity after these payments are taken into consideration in the allowable proportion, there exists a greater than 25 percent disparity caused by the continued consideration of those payments in the calculation, then a State may assert, under the provisions set forth in § 115.62(c), that the application of the 25 percent disparity limitation would be inequitable under the circumstances. On that basis the State still would be eligible for consideration as a qualifying program. It should be understood that not only Pub. L. 81-874 payments but any Federal assistance payments which are taken into consideration by a State in its distribution of State aid are to be included in the calculation.

*Comment.* One commenter asked if a district cost differential incorporated into his State's school finance program can be excluded under the provisions of

§ 115.62(b)(3).

*Response*. No change in the regulation is necessary. The language contained in § 115.62(b)(3) specifically encompasses cost-of-living differentials as a class of expenditures for exclusion.

*Comment*. Five commenters requested that consideration be given to excluding local expenditures for the purpose of meeting additional costs associated with conditions of sparsity when applying the disparity standard as required by § 115.62(b)(3).

*Response*. No change has been made in the regulation. To the extent that the program of State aid specifically recognizes the additional costs associated with either sparsity or density of student population, § 115.62(b)(3) allows for consideration of that additional cost factor. It is recognized by the Office of Education that many districts in the Nation face substantial additional costs due to conditions of sparsity as well as to a variety of other conditions. For purposes of applying the disparity standard, a program of State aid includes not only those State contributions as defined in § 115.61(c)(1), but all local revenues equalized by the State in accordance with the standards set forth in § 115.62(b)(3). Local revenues equalized by a State program become an integral part of that program and cannot be reasonably distinguished. To allow the exclusion of certain unequalized expenditures at the local level because they were made for reasonable purposes (such as to meet additional costs associated with conditions of sparsity) would be to effectively allow the exclusion of all local unequalized expenditures in computing the expenditure disparity. While almost any local expenditure which acts to widen the expenditure disparity within a State may be defended on some basis of rationality,

where the State itself has not recognized the appropriateness of such an expenditure with respect to this own equalization program, it is felt that a presumption cannot lie in favor of the expenditure variance's being appropriate. However, under the provisions of § 115.62(c), a State could present evidence to justify the Commissioner's consideration of certain variances in disparities as attributable to sparsity factors other than those reflected in the program of State aid.

*Comment*. One commenter maintained that only revenue can be used in calculating the disparity standard as set forth in § 115.62(b), because school expenditures are not reported by specific sources of funds except in certain categorical programs and one could not identify expenditures which should be excluded.

*Response*. No change has been made in the regulation. Most States and local educational agencies commonly account for expenditures in such a manner as to permit the identification of categorical funds and their exclusion (except when taken into consideration in the program of State aid) for the calculation of expenditure disparities under § 115.62(b)(3).

*Comment*. Four commenters questioned the exclusion of expenditures or revenues for capital outlays and debt service in the calculation of the disparity standard set forth in § 115.62(b) and in the computation of the maximum proportion for consideration of Pub. L. 81-874 payments as local resources set forth in § 115.62(b).

*Response*. No change has been made in the regulation. The exclusion is based on the fact that Pub. L. 81-874 is a current expenditure program and, as a consequence, it would be inconsistent to incorporate into tests of program

qualification and into procedures for program operation measures of classes of expenditures which are unrelated to the purposes of the program in question. Additionally, expenditures for capital outlays and debt service are likely to fluctuate considerably from year to year and might act unfairly in the application of the disparity standard or any other uniform measure of current expenditure equity.

*Comment.* Three commenters objected to the exception clause as set forth in § 115.62(c) of this subpart on the ground that it does not include definitive criteria which will permit case-by-case judgments. In addition, the commenters objected to the inclusion of the evaluation criteria contained in § 115.62(c)(2)(v) of this subpart on the grounds that it is irrelevant to the issue to which the regulations are addressed.

*Response.* No changes has been made in the regulation. The commenters are correct in pointing out that the criteria established in § 115.62(c)(2) of this subpart are set forth in general language and are not defined in terms of mathematical measures. The intention of the exception clause is, in fact, to provide relief from precise mathematical evaluation if a State can demonstrate that such an evaluation applies unfairly. Because adjectives such as "predominantly," "adequately," and "substantial," are not provided with mathematical definitions in the regulation does not mean that these terms carry no meaning and cannot be reasonably applied.

The evaluation criteria contained in § 115.62(c)(2)(v) of this subpart is a commonly accepted characteristic of a sound plan to State school aid and is not irrelevant to the issue of the equity of a school finance system.

8. Section 115.62 *Proportion of Pub. L. 81-874 funds that may be taken into consideration.*

*Comment.* One commenter requested special consideration for his school district in the computation of proportion as set forth in § 115.63(b) because of his claim that the State failed to adequately recognize in its school aid program certain additional costs which must be met by the district.

*Response.* No change in the regulation is possible. The Commissioner cannot, by regulation, give special consideration to a particular local educational agency. It is not clear from the comment submitted what the exact basis is for the commenter's complaint. However, any local educational agency which feels that it is aggrieved by a determination under this regulation with regard to the program of State aid affecting it may request a hearing in accordance with the provisions of § 115.66 of this regulation.

*Comment.* One commenter asked if cash balances and indirect costs can be counted as local revenues in the computation of proportion as set forth in § 115.63(b).

*Response.* No change in the regulation is necessary. Only revenues earned in the current year will be counted as revenues. Indirect costs are not revenues but a classification of expenditure and, as such, cannot be counted as a revenue. Of course, revenues expended by a school district to meet costs which might be classified as indirect costs can be counted.

*Comment.* One commenter requested that a § 115.63(c)(1), which requires that only those revenues produced within the boundaries of a local educational agency can be counted in determining the proportion calculation, be amended to include revenues received from intermediate school districts or county units.

*Response*. The regulation has been changed in response to the comment. It was not intended that revenues received from intermediate school districts or from county units be excluded from consideration as local revenue in the proportionality calculation. Accordingly, the regulation has been rewritten by adding a subparagraph (3) to § 115.63(c) to clearly establish that revenues received by a local educational agency which are produced within the boundaries of an intermediate school district or local governmental instrumentally will be counted as local revenues.

*Comment*. One commenter requested that § 115.63(d)(1) be amended to permit a State to apply only a part of the proportion calculated if it so desires.

*Response*. No change in the regulation is necessary. Nothing in Pub. L. 81-874 or in this regulation would preclude a State from counting payments under the Act as local resources in a proportion less than the maximum permitted under the statutory and regulatory provisions.

9. Section 115.64. *Assurances*.

*Comment*. One commenter recommended that § 115.64(a)(b) be amended to require consultation by the applicant agency and the State educational agency prior to the submission of the assurances required under this section.

*Response*. No change has been made in the regulation. While the recommendation has practical merit in avoiding confusion as to the actions of the State with respect to local educational agencies (applicants under the program), the Commissioner does not feel that it is necessary to mandate consultation between State and local agencies. A local educational agency should know whether Pub. L. 81-874

payments are being taken into consideration by its State in the distribution of State aid and, if so, whether the State is doing so in the allowable proportion. If an applicant agency cannot in good faith submit an assurance under the provisions of § 115.64(a) because the State educational agency has failed to provide the applicant with the necessary information or for any other reason, then the applicant agency should not submit such an assurance. Failure to submit such an assurance will constitute sufficient cause for an initiation of proceedings by the Commissioner as provided for in § 115.64(d). However, failure to submit the assurance will not result in the suspension or termination of payments to the applicant agency prior to a final decision under this regulation.

10. Section 115.65 *Submissions and consultations.*

*Comment.* One commenter said that the purposes of the Act would be better served if a determination under the provisions of § 115.65 were made prior to permitting a State to take into account payments under Title I of Pub. L. 81-874.

*Response.* No change has been made in the regulation. It is felt that State governments will seek to comply with the statute and regulation. Opportunity is provided in § 115.65(c) for advance consultation for States concerned about the eligibility of a State aid program. Under § 115.66(h), provision is made for restoration of State aid payments to local educational agencies if the State program is determined not to qualify.

*Comment.* Three commenters suggested that § 115.65 be amended to permit a judgment to be made on the school aid information for the most recently completed fiscal year which is of binding application for the subsequent fiscal year.

*Response*. No change in the regulation is necessary. The acceptability of data rules contained in § 115.62(b)(5) will be applied in making judgments on the basis of the best available data. If school aid information favored by the commenters is the best available data in a particular case, that will be the data used in reaching a final determination.

11. Section 115.66 *Notice and opportunity for hearing*.

*Comment*. One commenter suggested that school districts be given the same notice and opportunity for hearings as the State under the provisions of § 115.66.

*Response*. No change in the regulation is necessary. Section 115.66 does provide school districts the same notice and opportunity for hearings as the State educational agency.

C. OTHER CHANGES

1. A number of typographical and technical corrections have been made.

2. Words importing the masculine gender have been deleted.

3. Section 115.62(c)(1)(ii) has been amended to provide that expenditures among local educational agencies in a State must be "more" equalized as a result of taking Pub. L. 81-874 payments into consideration in order for a State to seek qualification for its program of State aid on the basis of equity criteria. The proposed regulation had provided that expenditures would not be "less" equalized. Unless expenditures are more equalized by such State action it cannot be said fairly that Pub. L. 81-874 payments represent and impediment to equalization. A determination as to whether

expenditures will be more equalized can be made according to any generally accepted and appropriate statistical method for calculating comparative distribution around the State mean per pupil expenditure.

4. A new subparagraph (2) has been added to § 115.65(a) to require that, whenever a State or local educational agency shall petition the Commissioner for a determination under the provisions of that section, a State shall notify all local educational agencies receiving payments under Pub. L. 81-874 of its petition, and a local educational agency submitting a petition for determination shall notify the State of its action. Both parties will be accorded the right of intervention in the initial determination proceedings. This was done so that all parties possibly affected would have notice of the pending determination and have an opportunity for input into the initial determination procedure. The former subparagraph (2) has been renumbered subparagraph (3).

5. Section 115.65(b)(4) has been amended to provide that, in any hearing proceeding initiated by any party under this part, the commissioner may request from the States data necessary for reaching a determination. The proposed rule had provided only for those proceedings initiated by the Commissioner.

## D. ADOPTION OF REGULATION

After consideration of all comments, the Commissioner hereby adopts the proposed regulation which was published in the FEDERAL REGISTER on May 1, 1975 with the changes noted above as interim regulations as set forth below.

Effective date: Pursuant to section 431(d) of the General Education Provisions Act, as amended (20 U.S.C. 1232(d)),

these regulations have been transmitted to the Congress concurrently with the publication of this document in the FEDERAL REGISTER. That section provides that regulations subject thereto shall become effective on the forty-fifth day following the date of such transmission, subject to the provisions therein concerning Congressional action.

(Catalog of Federal Domestic Assistance No. 13,478—School Assistance in Federally Affected Areas—Maintenance and Operations.)

Dated: March 29, 1976.

T.H. BELL,
*U.S. Commissioner of Education*

Approved: June 8, 1976
DAVID MATHEWS,
*Secretary of Health, Education, and Welfare*

Title 45 of the Code of Federal Regulations is amended by adding a new Subpart G to Part 115 to read as follows:

**Subpart G—Determinations Under Section 5(d)(1) and (2)**

Sec.


115.60 Scope and purpose.
115.61 Programs of State aid designed to equalize expenditures.
115.62 Qualifying programs.
115.63 Proportion in which funds under the Act may be taken into consideration.
115.64 Assurances.
115.65 Submission and consultation.

115.66 Notice and opportunity for hearing.

## APPENDIX A

## Subpart G—Determination Under Section 5(d)(1) and (2)

### § 115.60 Scope and Purpose.

(a) *Scope*. This subpart applies to determinations pursuant to sections 5(d)(2) and (3) of the Act as amended by Pub. L. 93-380. For fiscal years prior to fiscal year 1976, references to section 5(d)(1) are to section 5(d)(2) and references to section 5(d)(2) are to section 5(d)(3).

(b) *Purpose*. The sole purpose of the regulations in this subpart is to implement the provisions of section 5(d)(2) of the Act. The definitions and standards contained herein have been developed with respect to the particular intent of the amendment made to section 5(d) of the Act by sections 304(c) and 305(a)(2) of Pub. L. 93-380 and should not be construed as establishing definitions and standards for any other purpose.

(20 U.S.C. 240(d); secs. 304(c), 305(a)(2), Pub. L. 93-380, 88 Stat. 484; 120 Cong. Rec. S8505, 8507 (daily ed. May 20, 1974))

### § 115.61 Programs of State aid designed to equalize expenditures.

(a) *Statutory Provisions*.

(1) Section 5(d)(1) of the Act provides that, except as provided in section 5(d)(2), no payment s may be made to any local educational agency within a State which takes into

consideration payments under section 5 of the Act in determining the eligibility of such agency for State aid, or the amount of such aid, with respect to free public education during the fiscal year of such payments or the preceding fiscal year, or which makes aid available in such a manner as to result in less State aid to such agency which is eligible for payments under the Act than such agency would receive if it were not so eligible.

(2) Section 5(d)(2) of the Act provides that, notwithstanding section 5(d)(1), if a State has in effect a program of State aid for free public education for any fiscal year, which is designed to equalize expenditures for free public education among the local educational agencies of that State, payments under the Act may be taken into consideration by such State in determining (i) the relative financial resources available to local educational agencies in that State and (ii) the relative financial need of such agencies for the provision of free public education for children served by such agencies, subject to the provisions in such section.

(20 U.S.C. 240(d); secs. 304(c), 305(a)(2), Pub. L. 93-380, 88 Stat. 484)

(b) *General Rules.* (1) Except as provided in subparagraph (b)(2) of this section, a State may take into consideration payments under the Act in making the determinations described in paragraph (a)(2) of this section if such State has a program of State aid which qualifies under § 115.62 except that such payments may be taken into consideration for each affected local educational agency only in the proportion described in § 115.63.

(2) No program of State aid may qualify under this subpart if a court of that State has determined by final

order, not under appeal, that such program fails to equalize expenditures for free public education among local educational agencies within the State or otherwise violates law.

(c) *Data for determinations.* Determinations under this subpart may be made: (i) On the basis of data for the fiscal year preceding the fiscal year of determination if the same program was then in effect; or (ii) On the basis of estimates of data for the fiscal year of determination. Data submitted shall be the most currently available and complete data whether based on revenues or current expenditures. Estimates submitted by a State educational agency or other appropriate State agency shall set forth the assumption upon which such estimates are founded, shall be accompanied by an assurance as to their accuracy, and shall be adjusted by actual data for the fiscal year of determination as soon as available for the purpose of verification.

(d) *Definitions.* For the purposes of this subpart, the following terms shall have the meanings indicated below:

(1) "State aid" means any contribution, no repayment for which is expected, which is made by a State to or on behalf of local educational agencies within the State for current expenditures in the provision of free public education;

(2) "Equalize expenditures" means to meet the standards set forth in § 115.62;

(3) "Current expenditures" means the total charges incurred for the benefit of the school year, exclusive of capital outlay and debt service for capital outlay;

(4) "Revenue" means an addition to assets which does

not increase any liability, does not represent the recovery of an expenditure, does not represent the cancellation of certain liabilities without a corresponding increase in other liabilities or a decrease in assets, and does not represent a contribution of fund capital in food service or pupil activity funds.

(20 U.S.C. 240(d)(2))

**§ 115.62 Qualifying programs.**

(a) *General standard.* A program of State aid shall be deemed to be a program of State aid for free public education which is designed to equalize expenditures for free public education among local educational agencies in that State within the meaning of section 5(d)(2) of the Act and this subpart if such program—

(1) Is authorized by State law in effect for the fiscal year for which the determination under this subpart is made;

(2) of the Act and this subpart if such State aid among local educational agencies in the State to order to carry out the objectives of such program;

(3) Provides that in determining the amount to be apportioned to each local educational agency in the State, the State will take into consideration the relative financial resources available to local educational agencies in that State for such program; and

(4) Meets the standard of paragraphs (b) or (c) of this section.

Under the provisions of this section, the term "equalize expenditures" shall not be construed in any manner adverse

to a program of State aid for free public education which provides for taking into consideration the additional cost of providing free public education for particular groups or categories of pupils in meeting the special educational needs of such children as handicapped children, economically disadvantaged, those who need bilingual education, and gifted and talented children.

(b) *Disparity Standard.* (1) Except as provided in paragraph (c) of this section, a program of State aid described in paragraph (a) of this section shall be deemed to qualify under this section if, for the fiscal year for which the determination "under this subpart is made, the disparity in the amount of current expenditures or revenue per pupil for free public education among local educational agencies having similar grade levels in the State is no more than 25 per cent, as determined according to the procedures set forth in Appendix A of this subpart.

(2) For the purposes of this paragraph, the term current expenditures or revenue per pupil shall be computed on the basis of the total number of pupils in the public schools of the local educational agencies of the State (determined by whatever standard measurement of pupil count is used in such State).

(3) If a program of State aid subject to a determination under this subpart uses a "weighted" pupil or other unit of pupil need in determining allocations of State aid in order to reflect the cost differentials associated with pupils having special educational needs (such as handicapped children, economically disadvantaged children, those in need of bilingual education, and gifted and talented children) and cost differentials associated with sparsity or density of population, cost of living, or special

socioeconomic characteristics, computations under this paragraph may be made on the basis of such "weighted" pupils or other units of pupil need. In computing current expenditures or revenue per pupil for all programs other than those described in the preceding sentence, such computation shall include all revenues for education from State and local sources applied or contributed for current expenditures in local educational funds for which such local educational agencies have no obligation to account to the Federal government for the particular use thereof, but such computation shall identify and then exclude those State and equalized local funds applied or contributed outside a program of State aid subject to this subpart for the free public education of children in need of special education services, such as those referenced in the preceding sentence. Federal funds shall be included in computing current expenditures or revenue per pupil only to the extent that such funds would be actually taken into consideration by a State under a State aid program conforming to the requirements of section 5(d)(2)(A)(ii) of the Act and § 115.63 of this subpart.

(c) *Exception in case of programs not qualifying under paragraph (b)* of this section (1) A State program which does not meet the requirements of paragraph (b) of this section may, nevertheless, qualify under this section if the Commissioner determines on the basis of information submitted by the State, that (i) a decision not to apply the exact disparity standard specified in paragraph (b) of this section to the program submitted by the State would be justifiable because of exceptional circumstances within the State related to disparities in current expenditures or revenue per pupil for education, (ii) current expenditures or revenues for education in such State will be more equalized if payments under the Act are taken into consideration under this subpart

than if they are not, and (iii) the program meets the requirements of paragraph (c)(3) of this section.

(2) For purposes of paragraph (c)(1)(ii) of this section, current expenditures or revenues for education within a State shall be deemed to be "more equalized" if the distribution around the mean per pupil expenditure for all local educational agencies within the State is less when payments under the Act are taken into consideration in conformity with § 115.63 of this part than when they are not, as calculated according to accepted statistical methods appropriate to the circumstances.

(3) A program of State aid considered under this paragraph shall not be determined to be a program designed to equalize expenditures among local educational agencies in the State unless the Commissioner finds that, in addition to meeting the requirements of the preceding subparagraphs —

(i) The amount of the revenue available to local educational agencies in the State is not predominantly a function of the wealth of individual local educational agencies;

(ii) Such program is designed to ensure the provision of financially adequate educational programs and supportive services for every pupil in the State who is enrolled in public schools;

(iii) In the determination of the relative financial need of local educational agencies, such program (*a*) makes provision for identifying those pupils with special educational needs (such as handicapped children, economically disadvantaged children,

children with limited English-speaking ability); (*b*) takes into consideration the additional costs of providing free public education for such children or categories of children; and (*c*) takes into consideration the costs of providing education which might be associated with such factors as sparsity or density of population, cost of living, and socio-economic characteristics of the local educational agencies; except that nothing in this clause shall be construed to require any particular system of weighting of pupils.

(iv) Such program involves a substantial percentage of school revenues;

(v) Such program is designed to provide systems and procedures for evaluating the degree to which the program is achieving its stated objectives.

(20 U.S.C. 240(d)(2); S. Rep. No. 763, 93d Cong., 2d Sess. 56 (1974); 102 Cong. Rec. S 8604-8607 (daily ed., May 20, 1974); *Id.*, H 7401 (daily ed., July 31, 1974); Congressional Research Service, *Public Law 874 and State Equalization Plans* 30-34 (H.R. Comm. On Education and Labor Print (March 1974))

**§ 115.63 Proportion in which funds under the Act my be taken into consideration.**

(a) *Provision of law.* Section 5(d)(3)(A)(ii) of the Act provides that a State may consider as local resources funds received under the Act only in proportion to-he share that local revenues covered under a State equalization program are of total local revenues. Such determinations of proportionality shall be made on a case-by-case, school district by school district basis, for each local educational

agency affected and not on the basis of a general rule to be applied throughout a State.

(20 U.S.C. 240(d)(2)(A)(ii); S. Rep. No. 1026, 93d cong., 2d Sess., 163)

(b) *Computation of proportion.* In computing the share that local revenues covered under a State equalization program are of total local revenues for a local educational agency with respect to a program qualifying under § 115.62, the proportion shall be obtained by dividing (1) the amount of local revenues covered under the equalization program by (2) the total local revenues attributable to current expenditures for free public education within such agency.

(c) *Local revenues.* For the purposes of this section —

(1) "Local revenues covered under a State equalization program" means those revenues for current expenditures produced within the boundaries of a local educational agency contributed to or taken into consideration in a program of State aid subject to a determination under this subpart, excluding all revenues from State and Federal sources.

(2) "Total local revenues" means all revenues for current expenditures of a local educational agency, including revenues for education programs for children needing special services, vocational education, transportation, and the like during the period in question but excluding all revenues from State and Federal sources.

(3) Revenues received by a local educational agency which are produced within the boundaries of an intermediate school district or other local governmental

instrumentality will be counted as local revenues.

(d) *Application of proportion to payments under the Act.* (1) The proportion established under this section (or a lesser proportion) for any local educational agency receiving payments under the Act may be applied by a State to actual receipts of such payments or to the prorated entitlements provided for under section 5 of the Act and § 115.24 of this part, subject to any further requirements of this subpart and other law.

(2) Such proportion may not by applied to any portion of a payment under the Act made to a local educational agency on the basis of low-rent housing pupils or handicapped children of uniformed services personnel after fiscal year 1975.

(20 U.S.C. 240(d)(2); 102 Cong. Rec. H7412(daily ed., July 31, 1974))

**§ 115.64 Assurances.**

(a) *By applicants.* Each applicant for financial assistance under the Act shall set forth an assurance in its application either (1) that the State in which it is situated is not taking payments to such applicant under the Act into consideration with regard to a program of State aid, or (2) that, if such State is taking such payments into consideration with regard to its program of State aid, the State is doing so, for such applicant, in conformity with § 115.63 of this subpart.

(b) *By State educational agencies.* Each State educational agency which certifies an application for financial assistance under the Act, as provided for in § 115.10 of this part, shall submit to the Commissioner an assurance with such

application either (1) that such State is not taking payments under the Act into consideration with regard to a program of State aid, or (2) that such State is taking such payments into consideration with regard to a program of State aid in conformity with section 5(d)(2) of the Act and this subpart.

(c) *State guarantee of payments.* Any State which does take payments under the Act into consideration with regard to its program of State aid shall submit an adequate assurance with every application that it certifies for financial assistance under the Act in accordance with § 115.10 of this part, that the State will pay to any local educational agency whose payments under the Act have been or will be taken into consideration with regard to such program, the full amount of such payments taken into consideration but not in fact received by such agency by the time of final payment under the Act for the fiscal year of determination. Such assurance shall also constitute a part of any submission for determination made by a State under § 115.65 of this subpart.

(d) *Failure to provide assurances.* A failure on the part of any local or State educational agency to set forth the assurances required by this section shall constitute sufficient cause for an initiation of proceedings by the Commissioner, as provided for in § 115.65 of this subpart, but shall not result in a suspension or termination of payments under the Act with respect to such agencies prior to the rendering of a final decision under this subpart.

(20 U.S.C. 240(d); S. Rep. No. 1026, 93d Cong., 2d Sess. 163 (1974))

**§ 115.65 Submission and consultation.**

(a) *Initiation.* (1) A proceeding under this subpart leading

to a determination by the Commissioner as to whether, or the extent to which a State may take into consideration payments under the Act in determining relative financial resources or need under a program of State aid may be initiated (i) by the State educational agency or other appropriate agency of the State; (ii) by a local educational agency which is or would be adversely affected by such taking into consideration; or (iii) by the Commissioner, if the Commissioner has reason to believe that such taking into consideration is in violation of section 5(d) of the Act and that payments to local educational agencies in the State should therefore be terminated under section 5(d) of the Act.

(2) Whenever a proceeding under this subpart is initiated, the party initiating the proceeding shall give adequate notice to all State and local agencies which might be adversely affected by a determination. Such agencies will be accorded a right of intervention in the determination proceedings.

(3) Nothing in this subpart shall be construed to prohibit a State which has not obtained a prior determination from the Commissioner under this subpart from taking into consideration payments under the Act as provided for in section 5(d)(2) of the Act if such action is in conformity with §§ 115.62 and 115.63 of this subpart.

(20 U.S.C. 240(d)(2); H.R. Rep. No. 805, 93d Cong., 2d Sess. 42-43 (1974))

(b) *Submission.* (1) A submission by a State or local educational agency under this section shall be made upon such forms as may be furnished by the Commissioner containing such information and assurances as may be required in order to carry out his functions under the Act and this subpart.

(2) A State educational agency in any such submission shall (i) demonstrate how its program of State aid comports with the criteria and standards in § 115.62 and (ii) indicate for each local educational agency receiving funds under the Act the proportion of such funds which will be taken into consideration in accordance with § 115.63.

(3) A local educational agency shall in such submission demonstrate how it is affected by the action of the State which is the subject of such submission and the applicability of the standards set forth in this subpart to such action.

(4) Whenever a proceeding is initiated under this subpart, the Commissioner may request from a State the data deemed necessary to make a determination under this subpart. A failure on the part of a State to comply with such request within a reasonable period of time shall result in a summary determination by the Commissioner that the program of State aid of such State does not comport with the regulations under this subpart.

(c) *Advance consultation.* States shall be afforded an opportunity upon request to consult with the Office of Education regarding the possible application of the requirements of this subpart to relevant proposed legislation (such as legislation providing for taking into account funds under the Act in determining the amount of State aid) prior to the adoption of such legislation.

(20 U.S.C. 240(d))

**§ 115.66 Notice and opportunity for hearing.**

(a) *General requirements.* Reasonable notice of a determination under this subpart and opportunity for a hearing with respect thereto shall be afforded any State educational agency or local educational agency adversely affected by such determination. Such notice and opportunity shall be afforded, and such hearing (if requested) shall take place prior to the implementation by the Commissioner of any such determination. Such notice shall set forth the reasons for the determination in sufficient detail to enable such agencies to respond.

(b) *Requests for hearing.* (1) A State or local educational agency which is adversely affected by a determination under section 5(d) of the Act and this subpart and which desires a hearing regarding such determination shall submit a written request for such a hearing within 30 days after appropriate notice to such agency. The time within which such a request must be filed will not be extended unless the time for filing such request is extended in writing by the Commissioner or the Commissioner's designee at the time notice of the determination is given.

(2) A request for a hearing in accordance with this section must specify the issues of fact and law to be considered. Where the requesting party is not a State educational agency, a copy of such request shall be furnished to the appropriate State educational agency by such party.

(c) *Time and place of hearing.* The hearing shall be held at a time and place fixed by the Commissioner or the Commissioner's designee (with due regard to the mutual convenience of the parties).

(d) *Counsel.* In all proceedings under this section, all

parties shall have the right to be represented by counsel.

(e) *Proceedings.* The Commissioner may refer the matter in controversy to a hearing officer or to a hearing panel designated by the Commissioner for such purpose. Such hearing officers or hearing panel may consist of or include persons who are employees of the Department, employees of other Federal departments and agencies, and persons who are not such employees.

(f) *Procedural rules.* (1) If in the opinion of the hearing officer or panel no dispute exists as to a material fact the resolution of which would be materially assisted by oral testimony, the hearing officer or panel shall take appropriate steps to afford each party to the proceeding an opportunity for presenting his case at the option of the hearing officer or panel (i) in whole or in part in writing or (ii) in an informal conference which shall afford each party sufficient notice of the issues to be considered (where such notice has not previously been afforded).

(2) With respect to hearings involving a dispute as to a material fact the resolution of which would be materially assisted by oral testimony, the hearing officer or panel shall afford each party, in addition to the notice of issues required by paragraph (f)(1)(ii) of this section, the following:

(i) An opportunity for a record of the proceedings;

(ii) An opportunity to present witnesses on the party's behalf; and

(iii) An opportunity to cross-examine other witnesses either orally or through written interrogatories.

(g) *Decisions.* When a hearing officer or panel is designated to consider the matter, such officer or panel shall make an initial decision based upon written findings, which shall be forwarded to the Commissioner, who may, by appropriate notification to the parties, determine to review it or certify it as the final decision of the Commissioner without further proceedings. Written notice of the initial decision shall be sent to all parties. In any case in which the Commissioner modifies or revises the initial decision, such action shall be accompanied by a written statement of the grounds for such reversal or modification. Notice of the final decision of the Commissioner shall be served upon all parties to the hearing, the hearing panel and any local educational agency which may be adversely affected thereby.

(h) *Effect on payments.* (1) Subject to the provisions of subparagraph (a) when an appropriate request for a hearing under this section has been made, payments to a local educational agency under the Act shall not be reduced or terminated by the Commissioner by virtue of the operation of section 5(d)(1) of the Act until a final decision with respect to the matter in controversy has been made under this subpart.

(2) If a State has been finally determined, after notice and opportunity for hearing, to have been taking into consideration payments under the Act with respect to a program of State aid in violation of sections 5(d)(1) and (2) of that Act, the Commissioner shall terminate payments under the Act to all local educational agencies in that State unless such State agency provides satisfactory assurances that it will restore to all affected local agencies all amounts which were taken into account in determining State aid for such agencies in excess of the amount permitted under sections 5(d)(1) and (2) of the Act and that it will thereafter take into account only such amounts

as are permitted under the Act and this subpart.

(20 U.S.C. 240(d); S. Rep. No. 1026, 93d Cong., Sess. 163 (1974))

## APPENDIX A

[Pub. L. 81-874, Section 5(d)]

ASSISTANCE FOR LOCAL EDUCATIONAL AGENCIES IN AREAS AFFECTED BY FEDERAL ACTIVITIES; METHODS OF CALCULATIONS FOR TREATMENT OF PAYMENT UNDER STATE EQUALIZATION PROGRAMS

The following paragraphs described the methods for making certain calculations in conjunction with determinations made under various requirements of the regulations set forth in this subpart. These methods shall be the only methods used in making calculations.

1. *Determinations of disparity standard compliance under § 115.62(b)(1).*

The determination of disparity in current expenditures or revenue per pupil shall be made by:

(a) Ranking all local educational agencies having similar grade levels within the State on the basis of current expenditures or revenues per pupil with respect to the fiscal year for which data has bee submitted in accordance with these regulations.

(b) Identifying those local agencies in each ranking which fall at the 95th and 5th percentiles of the total number of pupils in attendance in the schools of these

agencies; and

(c) Subtracting the lower current expenditure of revenue per pupil figure from the higher for those agencies identified in paragraph (b) and dividing the difference by the lower figure.

*Example:* In State X, after ranking all local educational agencies organized on a grade 9-12 basis in order of the expenditures per pupil for the fiscal year in question, it is ascertained by counting the number of pupils in attendance in these agencies in ascending order of expenditure that the 5th percentile of student population is reached at LEA A with a per pupil expenditure of $820, and that the 95th percentile of student population is reached at LEA B with a per pupil expenditure of $1000. The percentage disparity between the 95th and 5th local educational agencies is 22 percent ($1000-$820=$180/$820). The program would be deemed to qualify.

2. *Determination under § 115.63(b) as to maximum proportion of Pub. L. 81-874 payments that may be taken into consideration by a State under an equalization program.* The proportion that local revenues covered under a State equalization program are of total local revenues for a particular local educational agency shall be obtained by dividing: (a) the amount of local revenues covered under the equalization program by (b) the total local revenues attributable to current education within the agency.

*Examples:*

*Example 1:* State A has an equalization program under which each LEA is guaranteed $900 per pupil less the

LEA contribution based on a uniform tax levy. LEA X contributes $700 per pupil and the State contributes the $200 difference. No other local revenues are applied to current expenditures for education by LEA X. The percentage of funds under the Act which may be taken into consideration by State A for LEA X is 100% (700/700). If LEA X receives $100 per pupil in Public Law 81-874 funds, $100 per pupil may be taken into consideration by State A in determining LEA X's relative financial resources and needs under the program. LEA X is regarded as contributing $800 and State A would not contribute the $100 difference.

*Example 2:* The initial facts are the same as in Example 1, except that LEA X, under a permissible additional levy outside the equalization program, raises an additional $100 per pupil. The percentage of Pub. L. 81-874 funds which may be taken into consideration is 87.5% (700/800). If LEA X receives $100 per pupil in Pub. L. 81-874 funds, $87.50 per pupil may be taken into consideration. LEA X is now regarded as contributing &787.50 per pupil under the program and State A would now contribute $112/50 per pupil as the difference.

*Example 3:* State B has an equalization program in which each participating LEA is guaranteed a certain per pupil revenue at various levels if tax rates. For an 8 mill rate the guarantee is $500, for 9 mills $550, for 10 mills $600. LEA Y levies a 10 mill rate and realizes $300 per pupil. Furthermore, it levies an additional 10 mills under a local leeway option, realization another $300 per pupil. The percentage of Pub. L. 81-874 which may be taken into consideration is 50% (300/600). If LEA Y receives $100 per pupil in Pub. L. 81-874 funds, $50 per pupil may be taken into consideration. LEA Y may be regarded as contributing

$350 per pupil under the program and State B would now contribute $250 as the difference.

[FR Doc. 76–18005 Filed 6-24-76; 8:45 am]

**FEDERAL REGISTER**

Friday, September 29, 1995

**Part VI**
**Department of Housing and Urban Development**

Office of the Assistant Secretary for Community Planning and Development

Notice of Funding Availability for FY 1995 Historically Black Colleges and Universities Program: Notice

§ *222.165* What procedures does the Secretary follow after making a determination under section 8009?

Section 222.165 describes the procedures for administrative appeals of determinations by the Secretary and the procedures for corrective actions by States.

Waiver of Proposed Rulemaking

In accordance with the Administrative Procedure Act (5 U.S.C. 553), it is the Secretary's practice to offer interested parties the opportunity to comment on proposed regulations. However, these regulations merely reflect statutory changes, remove unnecessary and obsolete regulatory provisions, reorganize and clarify the language of the regulations, and make minor procedural revisions. Thus, the regulations do not establish or affect substantive policy. Therefore, the Secretary has determined with respect to amendments made due to statutory changes that, pursuant to 5 U.S.C. 553 (b)(B), publication of a proposed rule is unnecessary and contrary to the public interest, and with respect to the procedural changes that, pursuant to 5 U.S.C. 553(b)(A),

public comment is not required.

Regulatory Flexibility Act Certification

The Secretary certifies that these regulations would not have a significant economic impact on a substantial number of small entities. The small entities that would be affected by these regulations are small LEAs receiving Federal funds under this program. However, the regulations would not have a significant economic impact on the small LEAs affected because the regulations will not impose excessive regulatory burdens or require unnecessary Federal supervision. The regulations would impose minimal requirements to ensure the proper expenditure of program funds.

List of Subjects in Part 222

Education, Education of children with disabilities, Elementary and secondary education, Federally affected areas, Grant programs--education, Indians--education, Public housing, Reports and recordkeeping requirements, School construction.

*34 CFR Part 218*

Education, Elementary and secondary education, Federally affected areas, Grant programs--education.

*34 CFR Part 219*

Education, Elementary and secondary education, Federally affected areas, Grant programs--education, Reports and recordkeeping requirements, School construction.

*34 CFR Parts 221 and 222*

Education, Elementary and secondary education, Federally affected areas, Grant programs--education, Reports and recordkeeping requirements, School construction.

*34 CFR Part 223*

Education, Elementary and secondary education, Federally affected areas, Grant programs--education, Indians--education.

Dated: September 25, 1995.

Thomas W. Payzant,
*Assistant Secretary for Elementary and Secondary Education.*

(Catalog of Federal Domestic Assistance Number 84.041, Impact Aid—Maintenance and Operations)

For the reasons set out in the preamble and under the authority at 20 U.S.C. 7701-7714, the Secretary amends chapter II of title 34 of the Code of Federal Regulations as follows:

*Part 218 [Removed]*

1. Part 218 is removed.

*Part 219 [Removed]*

2. Part 219 is removed.

*Part 221 [Removed]*

3. Part 221 is removed.

*Part 223 [Removed]*

4. Part 223 is removed.

5. Part 222 is revised to read as follows:

**PART 222--IMPACT AID PROGRAMS**

**Subpart A—General**

Sec.


222.1 What is the scope of this part?
222.2 What definitions apply to this part?
222.3 How does a local educational agency apply for assistance under section 8002 or 8003 of the Act?
222.4 How does the Secretary determine when an application is timely filed?
222.5 When may a local educational agency amend its application?
222.6 Which applications does the Secretary accept?
222.7 What information may a local educational agency submit after the application deadline?
222.8 What action must an applicant take upon a change in its boundary, classification, control, governing authority, or identity?
222.9 What records must a local educational agency maintain?
222.10 How long must a local educational agency retain records?
222.11 How does the Secretary recover overpayments?
222.12 [Reserved]
222.13 What other statutes and regulations apply to this part?

222.14-222.19[Reserved]

**Subpart B—Payments for Federal Property under Section 8002 of the Act**

222.20 What definitions apply to this subpart?
222.21 What requirements must a local educational agency meet concerning Federal acquisition of real property within the local educational agency?
222.22 How does the Secretary treat compensation from Federal activities for purposes of determining eligibility and payments?
222.23-222.29 [Reserved]

**Subpart C—Payments for Federally Connected Children under Section 8003(b) and (e) of the Act**

222.30 What is "free public education"?
222.31 To which local educational agencies does the Secretary make basic support payments under section 8003(b) of the Act?
222.32 Upon what information is a local educational agency's basic support payment based?
222.33 When must an applicant make its first or only membership count?
222.34 If an applicant makes a second membership count, when must that count be made?
222.35 How does a local educational agency count the membership of its federally connected children?
222.36 What minimum number of federally connected children must a local educational agency have to receive a payment on behalf of those children under section 8003(b) and (e)?
222.37 How does the Secretary calculate the average daily attendance of federally connected children?

222.38 What is the maximum basic support payment that a local educational agency may receive under section 8003(b)?
222.39 How does a State educational agency identify generally comparable local educational agencies for local contribution rate purposes?
222.40 How does a local educational agency select a local contribution rate based on generally comparable local educational agencies?
222.41 How does a State educational agency compute local contribution rates based upon generally comparable local educational agencies?
222.42-222.49 [Reserved]

**Subpart D—Payments under Section 8003(d) of the Act for Local Educational Agencies That Serve Children with Disabilities**

222.50 What definitions apply to this subpart?
222.51 Which children may a local educational agency count for payment under section 8003(d) of the Act?
222.52 What requirements must a local educational agency meet to receive a payment under section 8003(d)?
222.53 What restrictions and requirements apply to the use of funds provided under section 8003(d)?
222.54 What supplement-not-supplant requirement applies to this subpart?
222.55 What other statutes and regulations are applicable to this subpart?
222.56-222.59 [Reserved]

**Subpart E--Additional Assistance for Heavily Impacted Local Educational Agencies under Section 8003(f) of the Act**


222.60 What are the scope and purpose of these regulations?

222.61 What data are used to determine a local educational agency's eligibility and payment under section 8003(f) of the Act?

222.62 Which local educational agencies are eligible to apply for an additional payment under section 8003(f)?

222.63 What other requirements must a local educational agency meet in order to be eligible for financial assistance under section 8003(f)(2)(A)?

222.64 What other requirements must a local educational agency meet in order to be eligible for financial assistance under section 8003(f)(2)(B)?

222.65 How may a State aid program affect a local educational agency's eligibility for assistance under section 8003(f)?

222.66 How does the Secretary determine whether a fiscally independent local educational agency is making a reasonable tax effort?

222.67 What tax rates does the Secretary use if real property is assessed at different percentages of true value?

222.68 What tax rates does the Secretary use if two or more different classifications of real property are taxed at different rates?

222.69 What tax rates may the Secretary use if substantial local revenues are derived from local tax sources other than real property taxes?

222.70 How does the Secretary determine whether a fiscally dependent local educational agency is

making a reasonable tax effort?
222.71 What information must be provided by the State educational agency?
222.72 How does the Secretary determine a maximum payment for local educational agencies that are eligible for financial assistance under section 8003(f)(2)(A) and § 222.63?
222.73 How does the Secretary determine a maximum payment for local educational agencies that are eligible for financial assistance under section 8003(f)(2)(B) and § 222.64?
222.74 How does the Secretary identify generally comparable local educational agencies for purposes of section 8003(f)?
222.75 How does the Secretary compute the average per pupil expenditure of generally comparable local educational agencies under this subpart?
222.76 What does the Secretary do if appropriation levels are insufficient to pay in full the amounts calculated under §§ 222.72 and 222.73?
222.77-222.79 [Reserved]

**Subpart F—[Reserved]**

**Subpart G—Special Provisions for Local Educational Agencies that Claim Children Residing on Indian Lands**

General

222.90 What definitions apply to this subpart?
222.91 What requirements must a local educational agency meet to receive a payment under section 8003 of the Act for children residing on Indian lands?
222.92 What additional statutes and regulations apply to

this subpart?
222.93 [Reserved]

Indian Policies and Procedures

222.94 What provisions must be included in a local educational agency's Indian policies and procedures?
222.95 How are Indian policies and procedures reviewed to ensure compliance with the requirements in section 8004(a) of the Act?
222.96-222.101 [Reserved]

Indian Policies and Procedures Complaint and Hearing Procedures

222.102 Who may file a complaint about a local educational agency's Indian policies and procedures?
222.103 What must be included in a complaint?
222.104 When does the Assistant Secretary consider a complaint received?
222.105-222.107 [Reserved]
222.108 What actions must be taken upon receipt of a complaint?
222.109 When may a local educational agency reply to a complaint?
222.110 What are the procedures for conducting a hearing on a local educational agency's Indian policies and procedures?
222.111 What is the authority of the hearing examiner in conducting a hearing?
222.112 What procedures are followed after the hearing?
222.113 What are the responsibilities of the Assistant Secretary after the hearing?

222.114-222.129 [Reserved]

**Subpart H—[Reserved]**

**Subpart I—Facilities Assistance and Transfers under Section 8008 of the Act**

222.140 What definitions apply to this subpart?
222.141 For what types of projects may the Secretary provide assistance under section 8008 of the Act?
222.142 What terms and conditions apply to minimum school facilities operated under section 8008 by another agency?
222.143 What terms and conditions apply to the transfer of minimum school facilities?
222.144-222.149 [Reserved]

**Subpart J—Impact Aid Administrative Hearings and Judicial Review under Section 8011 of the Act**

222.150 What is the scope of this subpart?
222.151 When is an administrative hearing provided to a local educational agency?
222.152 When may a local educational agency request reconsideration of a determination?
222.153 How must a local educational agency request an administrative hearing?
222.154 How must written submissions under this subpart be filed?
222.155 When and where is an administrative hearing held?
222.156 How is an administrative hearing conducted?
222.157 What procedures apply for issuing or appealing an administrative law judge's decision under section 8011(a) of the Act?

222.158 What procedures apply to the Secretary's review of an initial decision or certified record?
222.159 When and where does a party seek judicial review?

**Subpart K—Determinations under Section 8009 of the Act**

222.160 What are the scope and purpose of this subpart?
222.161 How is State aid treated under section 8009 of the Act?
222.162 What disparity standard must a State meet in order to be certified and how are disparities in current expenditures or revenues per pupil measured?
222.163 What proportion of Impact Aid funds may a State take into consideration upon certification?
222.164 What procedures does the Secretary follow in making a determination under section 8009?
222.165 What procedures does the Secretary follow after making a determination under section 8009?
222.166-222.169 [Reserved]

Appendix to Subpart K—Determinations Under Section 8009 of the Act—Methods of Calculations for Treatment of Impact Aid Payments under State Equalization Programs

Authority: 20 U.S.C. 7701-7714, unless otherwise noted.

**Subpart A—General**

**§ 222.1 What is the scope of this part?**

The regulations in this part govern the provision of financial assistance under title VIII of the Elementary and Secondary Education Act of 1965 (ESEA) to local educational agencies (LEAs) in areas affected by Federal activities.

(Authority: 20 U.S.C. 7701-7714)

**§ 222.2 What definitions apply to this part?**

(a) (1) The following terms defined in section 8013 of the Act apply to this part:

Armed forces
Average per-pupil expenditure
Construction
Current expenditures
Indian lands
Local contribution percentage
Low-rent housing
School facilities

(2) The following term defined in § 222.30 applies to this part:

Free public education

(b) The following terms defined in section 14101 of the ESEA (General Provisions) also apply to this part:

Average daily attendance (ADA)
Child
County
Department
Outlying area
Parent

**§ 222.162 What disparity standard must a State meet in order to be certified and how are disparities in current expenditures or revenues per pupil measured?**

(a) *Percentage disparity limitation.* The Secretary will consider that a State aid program equalizes expenditures if the disparity in the amount of current expenditures or revenue per pupil for free public education among LEAs in the State is no more than 25 percent for fiscal years 1995, 1996, and 1997; and no more than 20 percent for fiscal years 1998 and 1999. In determining the disparity percentage, the Secretary shall disregard LEAs with per pupil expenditures or revenues above the 95th percentile or below the 5th percentile of those expenditures or revenues in the State. The method for calculating the percentage of disparity in a State is set forth in the appendix to this subpart.

(b)(1) *Weighted average disparity for different grade level groups.* If a State requests it, the Secretary will make separate disparity computations for different groups of LEAs in the State that have similar grade levels of instruction.

(2) In those cases, the weighted average disparity for all groups, based on the proportionate number of pupils in each group, may not be more than the percentage provided in paragraph (a) of this section. The method for calculating the weighted average disparity percentage is set out in the appendix to this subpart.

(c) *Per pupil figure computations.* In calculating the current expenditures or revenue disparities under this section, computations of per pupil figures are made on one of the following bases:

(1) The per pupil amount of current expenditures or revenue for an LEA is computed on the basis of the total number of pupils receiving free public education in the schools of the agency. The total number of pupils is determined in accordance with whatever standard measurement of pupil count is used in the State.

(2) If a State aid program uses "weighted pupil," "classroom," "instructional unit," or another designated measure of need in determining allocations of State aid to take account of special cost differentials, the computation of per pupil revenue or current expenditures may be made on those bases. The two allowable categories of special cost differentials are-

(i) Those associated with pupils having special educational needs, such as children with disabilities, economically disadvantaged children, non-English speaking children, and gifted and talented children; and

(ii) Those associated with particular types of LEAs such as those affected by geographical isolation, sparsity or density of population, high cost of living, or special socioeconomic characteristics within the area served by an LEA.

(d) *Revenues and current expenditures included in determinations*. All revenues or current expenditures must be included for each LEA in the State in determining the percentage of disparity under paragraph (a) of this section.

(Authority: 20 U.S.C. 7709)

**§ 222.163 What proportion of Impact Aid funds may a State take into consideration upon certification?**

(a) *Provision of law.* Section 8009(d)(1)(B) provides that, upon certification by the Secretary, in allocating State aid a State may consider as local resources funds received under sections 8002 and 8003(b) (including hold harmless payments calculated under section 8003(e)) and Pub. L. 81-874 only in proportion to the share that local tax revenues covered under a State equalization program are of total local tax revenues. Determinations of proportionality must be made on a case-by-case basis for each LEA affected and not on the basis of a general rule to be applied throughout a State.

(Authority: 20 U.S.C. 7709)

(b) *Computation of proportion.* (1) In computing the share that local tax revenues covered under a State equalization program are of total local tax revenues for an LEA with respect to a program qualifying under § 222.162, the proportion is obtained by dividing the amount of local tax revenues covered under the equalization program by the total local tax revenues attributable to current expenditures for free public education within that LEA.

(2) In cases where there are no local tax revenues for current expenditures and the State provides all of those revenues on behalf of the LEA, the State may consider up to 100 percent of the funds received under the Act by that LEA in allocating State aid.

(Authority: 20 U.S.C. 7709 (d) (1) (B))

(c) *Application of proportion to Impact Aid payments.* Except as provided in § 222.161(a)(1)(ii) and (iii), the

proportion established under this section (or a lesser proportion) for any LEA receiving payments under sections 8002 and 8003(b) (including hold harmless payments calculated under section 8003(e)) and Pub. L. 81-874 may be applied by a State to actual receipts of those payments or payments under pub. L. 81-874.

(Authority: 20 U.S.C. 7709 (d)(1)(B))

**§ 222.164 What procedures does the Secretary follow in making a determination under section 8009?**

(a) *Initiation.* (1) A proceeding under this subpart leading to a determination by the Secretary under section 8009 may be initiated—

(i) By the State educational agency (SEA) or other appropriate agency of the State;

(ii) By an LEA; or

(iii) By the Secretary, if the Secretary has reason to believe that the State's action is in violation of section 8009.

(2) Whenever a proceeding under this subpart is initiated, the party initiating the proceeding shall give adequate notice to the State and all LEAs in the State.

(b) *Submission.* (1) A submission by a State or LEA under this section must be made in the manner requested by the Secretary and must contain the information and assurances as may be required by the Secretary in order to reach a determination under section 8009 and this subpart.

(2) (i) A State in a submission shall—

(A) Demonstrate how its State aid program comports with § 222.162; and

(B) Demonstrate for each LEA receiving funds under the Act that the proportion of those funds that will be taken into consideration comports with § 222.163.

(ii) The submission must be received by the Secretary no later than 120 calendar days before the beginning of the State's fiscal year for the year of the determination, and must include (except as provided in § 222.161(c)(2)) final second preceding fiscal year disparity data enabling the Secretary to determine whether the standard in § 222.162 has been met. The submission is considered timely if received by the Secretary on or before the filing deadline or if it bears a U.S. Postal Service postmark dated on or before the filing deadline.

(3) An LEA in a submission must demonstrate whether the State aid program comports with section 8009.

(4) Whenever a proceeding is initiated under this subpart, the Secretary may request from a State the data deemed necessary to make a determination. A failure on the part of a State to comply with that request within a reasonable period of time results in a summary determination by the Secretary that the State aid program of that State does not comport with the regulations in this subpart.

(5) Before making a determination under section 8009, the Secretary affords the State, and all LEAs in the State, an

opportunity to present their views.

(c) *Determinations.* The Secretary reviews the participants' submissions and any views presented at a predetermination hearing under paragraph (b)(5) of this section, including views submitted during the post-hearing comment period. Based upon this review, the Secretary issues a written determination setting forth the reasons for the determination in sufficient detail to enable the State or LEAs to respond. The Secretary affords reasonable notice of a determination under this subpart and the opportunity for a hearing to the State or any LEA adversely affected by the determination.

(Authority: 20 U.S.C. 7709)

Note to Paragraph (b)(2) of this section: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, an applicant should check with its local post office.

**§ 222.165 What procedures does the Secretary follow after making a determination under section 8009?**

(a) *Request for hearing.* (1) A State or LEA that is adversely affected by a determination under section 8009 and this subpart and that desires a hearing regarding that determination must submit a written request for a hearing within 30 days of receipt of the determination. The time within which a request must be filed may not be extended unless the Secretary, or the Secretary's delegatee, extends the time in writing at the time notice of the determination is given.

(2) A request f6r a hearing in accordance with this section

must specify the issues of fact and law to be considered.

(3) If an LEA requests a hearing, it must furnish a copy of the request to the State. If a State requests a hearing, it must furnish a copy of the request to all LEAs in the State.

(b) *Right to intervene.* Any LEA or State that is adversely affected by a determination shall have the right of intervention in the hearing.

(c) *Time and place of hearing.* The hearing is held at a time and place fixed by the Secretary or the Secretary's delegatee (with due regard to the mutual convenience of the parties).

(d) *Counsel* In all proceedings under this section, all parties may be represented by counsel.

(e) *Proceedings.* The Secretary refers the matter in controversy to an administrative law judge (ALJ) appointed under 5 U.S.C. 3105.

(f) *Filing requirements.* (1) Any written submission under this section must be filed by hand-delivery, mail, or facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(2) If agreed upon by the parties, service of a document may be made upon the other party by facsimile transmission.

(3) The filing date for a written submission under this section is the date the document is

(i) Hand-delivered;

(ii) Mailed; or

(iii) Sent by facsimile transmission, followed by a mailed hard copy.

(4) A party filing by facsimile transmission is responsible for confirming that a complete and legible copy of the document was received by the Department.

(5) *Procedural rules.* (1) If, in the opinion of the ALJ, no dispute exists as to a material fact the resolution of which would be materially assisted by oral testimony, the ALJ shall afford each party to the proceeding an opportunity to present its case—

(i) In whole or in part in writing; or

(ii) In an informal conference after affording each party sufficient notice of the issues to be considered.

(2) With respect to hearings involving a dispute as to a material fact the resolution of which would be materially assisted by oral testimony, the ALJ shall afford the following procedures to each party:

(i) Sufficient notice of the issues to be considered at the hearing.

(ii) An opportunity to make a record of the proceedings.

(iii) An opportunity to present witnesses on the party's behalf.

(iv) An opportunity to cross-examine other witnesses either orally or through written interrogatories.

(h) *Decisions.* The ALJ shall make an initial decision based upon written findings, which shall be forwarded to the Secretary. The Secretary may, by appropriate notification to the parties, determine to review it or certify it as the final decision of the Secretary without further proceedings. Written notice of the initial decision shall be sent to all parties. In any case in which the Secretary modifies or reverses the initial decision, a notice of that action shall be accompanied by a written statement of the grounds for the reversal or modification. Notice of the final decision of the Secretary is served upon all parties to the hearing, the hearing panel and any LEA that may be adversely affected.

(Authority: 20 U.S.C. 7709 and 7711)

(i) *Corrective Action.* (1) Within 30 days after a determination by the Secretary that a State has been in violation of section 8009 unless the determination is timely appealed by the State, the State shall provide satisfactory written assurances that it will undertake appropriate corrective action if necessary.

(2) A State found by the Secretary to have been in violation of section 8009 following a hearing shall provide, within 30 days after disposal of the hearing request (such as by a final decision issued under this subpart or withdrawal of the hearing request), satisfactory assurances that it is taking corrective action, if necessary.

(3) At any time during a hearing under this subpart, a State may provide the Secretary appropriate assurances that it will undertake corrective action if necessary. The Secretary or the ALJ, as applicable, may stay the proceedings pending completion of corrective action.

(Authority: 20 U.S.C. 7709)

**§§ 222.166-222.169 [Reserved]**

**Appendix to Subpart K**

*Determinations Under Section 8009 of the Act—Methods of Calculations for Treatment of Impact Aid Payments Under State Equalization Programs*

The following paragraphs describe the methods for making certain calculations in conjunction with determinations made under the regulations in this subpart. Except as otherwise provided in the regulations, these methods are the only methods that may be used in making these calculations.

1. *Determinations of disparity standard compliance under § 222.162(b)(1).*

(a) The determinations of disparity in current expenditures or revenue per pupil are made by—

(i) Ranking all LEAs having similar grade levels within the State on the basis of current expenditures or revenue per pupil for the second preceding fiscal year before the year of determination;

(ii) Identifying those LEAs in each ranking that fall at the 95th and 5th percentiles of the total number of

pupils in attendance in the schools of those LEAs; and

(iii) Subtracting the lower current expenditure or revenue per pupil figure from the higher for those agencies identified in paragraph (ii) and dividing the difference by the lower figure.

*Example:* In State X, after ranking all LEAs organized on a grade 9-12 basis in order of the expenditures per pupil for the fiscal year in question, it is ascertained by counting the number of pupils in attendance in those agencies in ascending order of expenditure that the 5th percentile of student population is reached at LEA A with a per pupil expenditure of $820, and that the 95th percentile of student population is reached at LEA B with a per pupil expenditure of $1,000. The percentage disparity between the 95th and 5th percentile LEAs is 22 percent ($1,000-$820= $180/$820). The program would meet the disparity standard for fiscal years before fiscal year 1998 but would not for subsequent years.

(b) In cases under § 222.162(b), where separate computations are made for different groups of LEAs, the disparity percentage for each group is obtained in the manner described in paragraph (a) above. Then the weighted average disparity percentage for the State as a whole is determined by—

(i) Multiplying the disparity percentage for each group by the total number of pupils receiving free public education in the schools in that group;

(ii) Summing the figures obtained in paragraph (b)(i); and

(iii) Dividing the sum obtained in paragraph (b)(ii) by the total number of pupils for all the groups.

Example

| | |
|---|---|
| Group 1 (grades 1-6), 80,000 pupils X 18.00% = ..... | 14,400 |
| Group 2 (grades 7-12), 100,000 pupils X 22.00% = ..... | 22,000 |
| Group 3 (grades 1-12), 20,000 pupils X 35.00% = ..... | 7,000 |
| Total 200,000 pupils ..... | 43,400 |

43,400/200,000=21.70% Disparity

*2. Determinations under § 222.163(b) as to maximum proportion of payments under the Act that may be taken into consideration by a State under an equalization program.* The proportion that local tax revenues covered under a State equalization program are of total local tax revenues for a particular LEA shall be obtained by dividing: (a) The amount of local tax revenues covered under the equalization program by (b) the total local tax revenues attributable to current expenditures within the LEA. Local revenues that can be excluded from the proportion computation are those received from local non-tax sources such as interest, bake sales, gifts, donations, and in-kind contributions.

*Examples*

*Example 1.* State A has an equalization program under which each LEA is guaranteed $900 per pupil less the

LEA contribution based on a uniform tax levy. The LEA contribution from the uniform tax levy is considered under the equalization program. LEA X contributes the proceeds of the uniform tax levy, $700 per pupil, and the State contributes the $200 difference. No other local tax revenues are applied to current expenditures for education by LEA X. The percentage of funds under the Act that may be taken into consideration by State A for LEA X is 100 percent ($700/$700). If LEA X receives $100 per pupil in payments under the Act, $100 per pupil may be taken into consideration by State A in determining LEA X's relative financial resources and needs under the program. LEA X is regarded as contributing $800 and State A would now contribute the $100 difference.

*Example 2.* The initial facts are the same as in Example 1, except that LEA X, under a permissible additional levy outside the equalization program, raises an additional $100 per pupil not covered under the equalization program. The permissible levy is not included in local tax revenues covered under the equalization program but it is included in total local tax revenues. The percentage of payments under the Act that may be taken into consideration is 87.5 percent ($700/$800). If LEA X receives $100 per pupil in payments under the Act, $87.50 per pupil may be taken into consideration. LEA X is now regarded as contributing $787.50 per pupil under the program and State A would now contribute $112.50 per pupil as the difference.

*Example 3.* State B has an equalization program under which each LEA is guaranteed $900 per pupil for contributing the equivalent of a two mill tax levy. LEA X contributes $700 per pupil from a two mill tax levy and an additional $500 per pupil from local interest, bake sales,

in-kind contributions, and other non-tax local sources. The percentage of funds under the Act that may be taken into consideration by State A for LEA X is 100 percent ($700/$700). The local revenue received from interest, bake sales, in-kind contributions and other non-tax local revenues are excluded from the computation since they are from non-tax sources. If LEA X receives $ 100 per pupil in payments under the Act, $100 per pupil may be taken into consideration by State A in determining LEA X's relative financial resources and needs under the program. LEA X is regarded as contributing $800 and State A would now contribute the $100 difference.

*Example 4.* State C has an equalization program in which each participating LEA is guaranteed a certain per pupil revenue at various levels of tax rates. For an eight mill rate the guarantee is $500, for nine mills $550, for 10 mills $600. LEA X levies a 10 mill rate and realizes $300 per pupil. Furthermore, it levies an additional 10 mills under a local leeway option realizing another $300 per pupil. The $300 proceeds of the local leeway option are not included in local tax revenues covered under the equalization program, but they are included in total local tax revenues. The percentage of payments under the Act that may be taken into consideration is 50 percent ($300/$600). If LEA X receives $100 per pupil in payments under the Act, $50 per pupil may be taken into consideration. LEA X may be regarded as contributing $350 per pupil under the program and State B would now contribute $250 as the difference.

*Example 5.* The initial facts are the same as in Example 4, except that LEA Y in State C, while taxing at the same 10 mill rate for both the equalization program and leeway allowance as LEA X, realizes $550 per pupil for each tax.

As with LEA X, the percentage of payments under the Act that may be taken into consideration for LEA Y is 50 percent (550/1100). If LEA Y receives $150 per pupil in payments under the Act, then up to $75 per pupil normally could be taken into consideration. However, since LEA Y would have received only $50 per pupil in State aid, only $50 of the allowable $75 could be taken into consideration. Thus, LEA Z may be regarded as contributing $600 per pupil under the program and State B would not contribute any State aid.

[FR Doc. 95-24216 Filed 9-28-95; 8:45 am]

BILLING CODE 4000-01-P

## APPENDIX F

**UNITED STATES OF AMERICA**
**DEPARTMENT OF EDUCATION**

| | | |
|---|---|---|
| IN THE MATTER OF | ) | |
| ZUNI PUBLIC SCHOOL | ) | Docket No. 99-81-I |
| DISTRICT #89 and | ) | |
| | ) | |
| GALLUP-MCKINLEY | ) | Impact Aid |
| PUBLIC SCHOOLS | ) | Proceeding |
| | ) | |
| Applicants | ) | |
| | ) | |

**JOINT STIPULATION OF LEGAL BACKGROUND AND FINDINGS OF FACT**

The Assistant Secretary for Elementary and Secondary Education, Respondent, the New Mexico Department of Education ("State"), Respondent, and Applicants Zuni Public School District #89 ("Zuni") and Gallup-McKinley County Public Schools ("Gallup-McKinley")respectfully submit the following stipulations. The parties reserve the right, however, to raise objections as to the relevance of any of these stipulated matters. The parties also reserve the right to proffer additional evidence, so long as such evidence is not inconsistent with any facts set forth by these stipulations.

A. LEGAL BACKGROUND: Section 8009(b) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. § 7709(b) .

1. The Impact Aid law, Title VIII of the Elementary and Secondary Education Act of 1965 (20 U.S.C.§§ 7701 et seq.), (the "Impact Aid law" or "the Act") was enacted in 1994 to fulfill the Federal responsibility to assist with the provision of educational services to federally connected children by providing financial assistance for those local educational agencies ("LEAs") upon which the United States has placed financial burdens. Such burdens occur either because a school district's ability to raise local revenues has been decreased due to the Federal government's acquisition of real property or because a school district provides an education for children residing on, or whose parents are employed on, Federal property. 20 U.S.C. 7701.

2. Section 8009(a) (20 U.S.C. § 7709(a)) of the Impact Aid law provides:

   (a) General prohibition. -Except as provided in subsection (b), a State may not-

      (i) consider payments under this subchapter or under the Act of September 30, 1950 [20 U.S.C.A. §§ 236 to 244] (Public Law 874, 81st Congress) (as such Act was in effect on the day preceding October 20, 1994) in determining for any fiscal year -

         (A) the eligibility of a local educational agency for State aid for free public education; or

         (B) the amount Of such aid; or

      (2) make such aid available to local educational

agencies in a manner that results in less State aid to any local educational agency that is eligible for such payment than such agency would receive if such agency were not eligible.

3. Section 8009(b) (20 U.S.C. § 7709(b)) of the Impact Aid law provides, in pertinent part:

(b) State equalization plans.–

(1) In general.–

A State may reduce State aid to a local educational agency that receives a payment under Section 7702 or 7703 (b) of this title (except the amount calculated in excess of 1.0 under subparagraph (B) of Section 7703 (a)(2) of this title) or under the Act of September 30, 1950 (Public Law 874, 81st Congress) [20 U.S.C.A. §§ 236 to 244] as such Act was in effect on the day preceding October 20, 1994 (other than an increase in payments described in paragraphs (2)(B), (2)(C), (2)(D), or (3)(B)(ii) of Section 3(d) of such Act of September 30, 1950 [20 U.S.C.A. § 238(d)]) for any fiscal year if the Secretary determines, and certifies under subsection (c)(3)(A) of this section, that such State has in effect a program of State aid that equalizes expenditures for free public education among local educational agencies in such State.

(2) Computation. –

(A) In general.–

For purposes of paragraph (1), a program of State aid equalizes expenditures among local educational agencies if, in the second fiscal year preceding the fiscal year for which the determination is made, the amount of per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the highest such per-pupil expenditures or revenues did not exceed the amount of such per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the lowest such expenditures or revenues by more than twenty-five percent (25%).

(B) Other factors.- In making a determination under this subsection, the Secretary shall –

(i) disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the fifth percentile of such expenditures or revenues in the State; and

(ii) take into account the extent to which a program of State aid reflects the additional cost of providing free public education in particular types of local educational agencies, such as those that are geographically isolated, or to particular types of students, such as children with disabilities.

4. In 1995, the Department of Education promulgated a regulation, 34 C.F.R. 222.162(a), pursuant to the

reauthorization of the Impact Aid program under P.L. 103-382. 60 Fed. Reg. 50774, 50798 (September 29, 1995). As originally promulgated section 222.162(a) provided:

> (a) Percentage Disparity limitation. The Secretary will consider that a State aid program equalizes expenditures if the disparity in the amount of current expenditures or revenues per pupil for free public education among LEAs in the State is not more than 25 percent for fiscal years 1995, 1996, and 1997; and no more than 20 percent for fiscal years 1998 and 1999. In determining the disparity percentage, the Secretary shall disregard LEAs with per pupil expenditures or revenues above the 95th percentile or below the 5th percentile of those expenditures or revenues in the State. The method for calculating the percentage of disparity in a State is set forth in the appendix to this subpart.

That regulation was subsequently amended to conform to a 1996 statutory amendment to section 8009(b)(2)(A) making 25% the maximum permissible disparity for certification for all years.

5. The appendix to Subpart K provides, in pertinent part:

> APPENDIX TO SUBPART K—DETERMINATIONS UNDER SECTION 8009 OF THE ACT—METHODS OF CALCULATIONS(sic) FOR TREATMENT OF IMPACT AID PAYMENTS UNDER STATE EQUALIZATION PROGRAMS
>
> The following paragraphs describe the methods for making certain calculations in conjunction with

determinations made under the regulations in this part. Except as otherwise provided in the regulations, these methods are the only methods that may be used in making these determinations.

1. Determinations of disparity standard Compliance under section 222.162(b)(1).

   (a) The determination of disparity in current expenditure or revenue per pupil are made by–

      (i) Ranking all LEAs having similar grade levels within the State on the basis of current expenditures or revenue per pupil for the second proceeding fiscal year before the year of determination;

      (ii) identifying those LEAs in each ranking that fall at the 95th and fifth percentile of the total number of pupils in attendance in the schools of those LEAs; and

      (iii)Subtracting the lower current expenditure or revenue per pupil figure from the higher of those agencies identified in paragraph (ii) and dividing the difference by the lower figure.

Example: In State X, after ranking all LEAs organized on a grade 9-12 basis in order of the expenditures per pupil for the fiscal year in question, it is ascertained by counting the number of pupils in attendance in those agencies in ascending order of expenditure that the 5th percentile of student population is reached at LEA A with a per pupil expenditure of $820, and that the 95th

percentile of student population is reached at LEA B with a per pupil expenditure of $1,000. The percentage disparity between the 95th and 5th percentile LEAs is 22 percent ($1,000-$820=$180/$8000. The program would meet the disparity standard for fiscal years before fiscal year 1998 but would not for subsequent years.

6. Even upon certification, the State may not consider certain Impact Aid funds received by a district under certain provisions of the Impact Aid law. See Section 8009(b)(i)(20 U.S.C. § 7709(b)(1)) and 34 C.F.R. § 222.161(a)(i)(ii). Further, as described in section 8009(d)(i)(B) of the Act, only a specified proportion of eligible Impact Aid may be considered. That proportion is "the share that local tax revenues covered under a State equalization program are of total local tax revenues." Regulations implementing this proportion are codified at 34 C.F.R. §§ 22.163 and 222.161(c) (definitions of "Local tax revenues covered under a State equalization program" and "Total local tax revenues").

B. The New Mexico School Funding Program

7. The New Mexico Public School Finance Act governing the State equalization program is codified at N.M.S.A. §§ 22-8-1 et seq.

8. For the 1999-2000 fiscal year, the New Mexico formula guarantees each LEA 100% of its calculated program cost based on actual prior year membership regardless of the LEA's wealth.

9. Under the formula, each LEA's program cost is calculated through a three-step process. First, the

actual student membership counts of specified categories of students are multiplied by statutory weighting factors associated with special categories of needs to derive a number of program units for each category. These categories include early childhood education, basic education (with weights differentiated by grade level), special education students, bilingual education students.

10. Grade level program units for kindergarten and programs for three- and four-year-old students ("early childhood education program units") are derived by counting kindergarten and developmentally disabled three- and four-year-old students as 0.5 early childhood membership and multiplying the resulting membership by the statutory weighting factor. The special education services units for both kindergarten and developmentally disabled three- and four-year-old students are calculated by multiplying the actual number of children by an additional statutory weighting factor. The New Mexico formula guarantees each LEA 100% of its calculated program cost for these children.

11. In the second step, certain of the LEA's program units are multiplied by an instructional staff training and experience index then summed with the other program units that are not adjusted by this index. These units include units generated for size adjustment (school size, district size, and rural isolation), enrollment growth, new district adjustment, at- risk program units, and units generated by special education students enrolled in a specified program. The instructional staff training and experience index is not applied to the program units for size, at-risk students,

enrollment growth and new district adjustments or certain special education students. See NMSA § 22-8-18(A).

12. Finally, in step three, the number Calculated as described in the previous paragraph is multiplied by a dollar figure ("program unit value") established by the State Superintendent of Public Instruction as directed by the State legislature to derive the LEA's program cost. The program unit value is determined by the State Superintendent of Public Instruction and is calculated by dividing the legislatively appropriated program cost (comprised of the appropriated state equalization guarantee plus the projected credits for impact aid, forest reserve, and the .5 mill levy) by the total number of units generated by all school districts for a given fiscal year.

13. To determine the amount of the LEA's "equalization guarantee distribution" (i.e., State aid), the LEA's "local revenue" and "Federal revenue" are deducted from program cost.

14. N.M.S.A. Section 22-8-25(B) provides "local revenue" is seventy-five percent of the LEA's receipts of school district property tax. Prior to June 18, 1999 it was defined as ninety-five percent of such receipts.

15. N.M.S.A. Section 22-8-25(C) provides "Federal revenue" is 75% of the LEA's share of Federal forest reserve funds and 75% of the Impact Aid that the State is permitted to consider. Prior to June 18, 1999 it was defined as 95% of the LEA's share of Federal forest reserve funds and the Impact Aid that the State was Permitted to consider.

C. New Mexico's FY 2000 Request for Certification Under Section 8009(b).

16. By letter dated February 10, 1999, the Director, School Budget Planning Unit, Department of Education, State of New Mexico notified the U.S. Department of Education and all school district superintendents in the State of its intent to take Impact Aid into consideration in the calculation of FY 2000 State aid. On February 22, 1999, the State submitted final FY 1998 financial data from the State in support of its request for certification (Attachment 1). Included within the State's February 22, 1999 submission to the U.S. Department of Education is a spreadsheet labeled "IMPACT AID DISPARITY FOR 1999-2000 Revenue Per Mem." The second column in the spreadsheet is titled "TOTAL 97-98 ACTUAL REVENUE" and includes revenue generated by the units produced by each district's training and experience index. The spreadsheet labeled "IMPACT AID DISPARITY FOR 1999-2000 DISPARITY/ADJUSTMENTS" shows units and revenues removed from the "TOTAL 97-98 ACTUAL REVENUE" for the purpose of calculating disparity. The units generated by the districts' training and experience index are not included within the units listed on the "IMPACT AID DISPARITY FOR 1999-2000 DISPARITY/ADJUSTMENTS."

17. As required by Section 8009(b)(2), a program of State aid is determined to equalize expenditures among LEAs if, in the second preceding fiscal year for which the determination is made, the amount of per-pupil expenditures made by, or per-pupil revenues available to, the LEA in the State with the highest such per-

pupil expenditures or revenues did not exceed the amount of such per/pupil expenditures made by, or per pupil revenues available to, the LEA in the State with the lowest such expenditures or revenues by more than 25 percent. In making this determination, the Secretary is required to disregard LEAs with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State, and is further required to take into account the extent to which a program of State aid reflects the additional cost of providing free public education in particular types of LEAs or to particular types of students. The State's position is that in calculating disparity for 1999-2000, the submission of the New Mexico State Department of Education (Attachment to letter to Catherine Schagh, dated February 22, 1999, pages 1, 2)(part of Attachment 2) reflects the following methodology: (1) first calculating the revenue per membership (determined according to federal regulation) for each LEA in the State, (2) ranking the LEAs according to revenues per membership from high to low, (3) then eliminating the top five percent (5%) and bottom five percent (5%) of state cumulative membership beginning at the top ranked LEAs and working down and then starting with the bottom ranked LEAs and working up, (4) drawing a line at those points at which the top five percent (5%) and the bottom five percent (5%) of state cumulative membership are reached. The LEAs above the top line and the LEAs below the bottom line are excluded and the revenue per membership of the remaining top LEA and the revenue per membership of the remaining bottom LEA are used to compute the disparity percentage. New Mexico's position is that the LEA at the 95th

percentile of state cumulative membership (not LEAs) was Penasco and the LEA at the fifth percentile of state cumulative membership (not LEAs) was Hobbs. The resulting disparity was 14.43%. Zuni's revenue per-pupil was $3,320.00. Gallup-McKinley's revenue per pupil was $2,861.00. The highest LEA revenue per-pupil was $6,520.00 and the lowest was $2,672.00. See Attachment 2, which shows the revenue per membership of the LEAs. The LEA parties in this proceeding wish to depose or pose interrogatories to the appropriate person or persons about the methodology used in the State's computations and will file an appropriate motion.

18. For fiscal year 1999-2000, total local property tax (.5 mill levy) revenues in New Mexico were $1,964,585.31 for the period 7/1/99 - 12/31/99, total Impact Aid basic payments were $58,376,914.60 as of 1/28/2000, and total forest reserve receipts were $456,180.34 as of 1/2000.

19. Pursuant to New Mexico statute, the sole local tax revenue for school district general operating purposes is a property tax rate of fifty cents ($.50) for each one thousand dollars ($1,000) of net taxable value of both residential and nonresidential property (including certain products and equipment related to copper, oil, and gas production) allocated to the school district. N.M.S.A. § 7-37-7.B(2). In accordance with the State's definition of "local revenue", seventy-five percent of such receipts (prior to June 18, 1999, ninety-five percent of such receipts) are "covered under the equalization program." By operation of State law, the proportion to the "share that local tax revenues covered under [the State] equalization

program are of total local tax revenues" is seventy-five percent. The determination of proportionality is consistent among all local educational agencies within the State.

20. On April 13, 1999, the Department notified all LEAs in the State of the availability of the February 22 State data submission and the opportunity for any LEA to request a hearing on the State's request.

21. On May 13, 1999, Bloomfield Schools requested a hearing but subsequently withdrew its request. As a consequence, no predetermination hearing was held since no other LEA requested a predetermination hearing. The determination was based on the State's data submission.

22. The Assistant Secretary's determination certifying the State was issued on October 5, 1999 (Attachment 2). A copy was provided to all LEAs in the State with notice of their right to a hearing. The parties are not stipulating that the disparity calculation or the calculation of that the offset to State aid was correct, but only that they occurred.

23. On October 25, 1999, Superintendent David L. Cockerham filed a hearing request on behalf of Zuni objecting to the determination. (Attachment 3).

24. On November 8, 1999, Superintendent Robert Gomez filed a hearing request on behalf of Gallup-McKinley objecting to the determination. (Attachment 4). Gallup-McKinley furnished a copy of its request to the State on or about December 3, 1999.

25. Attachment 5 shows certain tax receipts for Gallup-McKinley and certain Impact Aid Receipts and credits with regard to Gallup-McKinley and is stipulated to insofar as it accurately reflects data set forth in *New Mexico Public School Finance Statistics for* the years indicated.

26. The LEA parties' position is that there are additional local tax revenues not taken into account by New Mexico in applying the statutory proportion in Section 8009(d)(1)(B).

3/8/00
Dated

/s/
Mark W. Smith
Attorney for Respondent,
the Assistant Secretary for
Elementary and Secondary
Education, U.S. Department of
Education

3/8/00
Dated

/s/
Leigh M. Manasevit, Esq.
Jonathan D. Tarnow, Esq.
BRUSTEIN & MANASEVIT
Attorneys for Respondent,
New Mexico Department of Education

3/7/00
Dated

/s/
RONALD J. VanAMBERG
Attorney for Applicant,
Zuni Public School District #89

3/6/00
Dated

/s/
GEORGE W. KOZELISKI
Attorney for Applicant,

Gallup-McKinley County Pub. Schools
Post Office Box 478
Gallup, New Mexico 87305
505-863-9339

ATTACHMENT 1

STATE OF NEW MEXICO
DEPARTMENT OF EDUCATION —
EDUCATION BUILDING
SANTA FE, NEW MEXICO 87501-2786

MICHAEL J. DAVIS
SUPERINTENDENT OF
PUBLIC INSTRUCTION

Telephone: (505) 827-6516
Fax: (505)827-6696

February 22, 1999

Ms. Catherine Schagh, Director
Impact Aid Program
U.S. Department of Education
400 Maryland Avenue
Washington, D.C. 20202

Dear Ms. Schagh:

As required by Section 8009 of Title VIII, Public Law 103-382, this letter Shall serve as written notice that the State of New Mexico intends to consider 95% of eligible local sources of revenue and any eligible Impact Aid funds during the 1999-2000 school year. We are further advising you that we anticipate that legislation will be introduced during the upcoming legislative session (January 19 to March 20) that will, if enacted into law, provide that the state will consider 75% of eligible local sources of revenue and any eligible Impact Aid funds. Of the remaining 25%, 5% will continue to be available to the receiving district for operational use, while the remaining 20% will be set aside by the receiving district to be used for its own capital outlay needs. The attached copy of a memorandum sent to New Mexico school

districts shall serve as evidence that we have notified each local educational agency of our intent, as required by Section 8009.

In addition, we will not request a Local Contribution Rate for fiscal year 2000 for New Mexico applicants under Section 8003(b)(1)(C). We have opted to request the minimum rate of payment guaranteed by statute, one-half of the average per-pupil expenditure of all States.

Sincerely,

/s/
MICHAEL J. DAVIS
State Superintendent of Public Instruction

STATE OF NEW MEXICO
DEPARTMENT OF EDUCATION —
EDUCATION BUILDING
SANTA FE, NEW MEXICO 87501-2786

MICHAEL J. DAVIS
SUPERINTENDENT OF
PUBLIC INSTRUCTION

Telephone: (505) 827-6516
Fax: (505)827-6696

February 10, 1999

**MEMORANDUM**

To: School District Superintendents

From: Kathleen Forrer, Ed.D., Director
School Budget Planning Unit

Subject: Impact Aid Credit

---

Pursuant to the requirements of Section 8009 of Title VIII, Public Law 103-382, this letter shall serve as notification to your local education agency that the State Of New Mexico intends to consider 95% of eligible local sources of revenue and any eligible Impact Aid funds during the 1999-2000 school year. We are further advising you that we anticipate that legislation will be introduced during the upcoming legislative session (January 19 to March 20) that will, if enacted into law, provide that the state will consider 75% of eligible local sources of revenue and any eligible Impact Aid funds. Of the remaining 25%, 5% will continue to be available to the receiving district for operational use, while the remaining 20% will be Set aside by the receiving district to be used for its own capital outlay needs.

STATE OF NEW MEXICO
DEPARTMENT OF EDUCATION —
EDUCATION BUILDING
SANTA FE, NEW MEXICO 87501-2786

MICHAEL J. DAVIS
SUPERINTENDENT OF
PUBLIC INSTRUCTION

Telephone: (505) 827-6516
Fax: (505)827-6696

February 22, 1999

Ms. Catherine Schagh, Director
Impact Aid Program
U.S. Department of Education
600/ndependence Avenue, S.W.
Washington, D.C. 20202-6244

Dear Ms. Schagh:

Enclosed for your approval is the Impact Aid (Title VIII) Disparity analysis for the State of New Mexico. Pursuant to federal regulation, all applicable local revenue received by New Mexico school districts in 1997-98 have been included. Also included is a worksheet on the proportion of local equalized revenue to total local revenue for your review.

In accordance with Section 222.161, we request that the 1997-98 data be used to determine New Mexico's eligibility for Impact Aid funding for 1999-2000.

If you have any questions or need additional information, please contact me at 827-3860.

Sincerely,

/s/

Kathleen Forrer, Ed.D.
Director
School Budget Planning/School Finance Analysis and Capital Outlay

# NEW MEXICO STATE DEPARTMENT OF EDUCATION

## IMPACT AID DISPARITY FOR 1999-2000
Based on Actual Revenue for 1997-1998

| DIST. | REV/ MEM. | TOTAL MEM. | CUM. MEM. | REV/MEM AT 95/5% |
|---|---|---|---|---|
| Mosquero | $6,520 | 57.00 | 57.0 | |
| Corona | $5,791 | 81.00 | 138.0 | |
| Los Alamos | $5,611 | 3509.50 | 3647.5 | |
| Vaughn | $4,641 | 111.50 | 3759.0 | |
| Hondo Valley | $3,690 | 157.50 | 3916.5 | |
| Maxwell | $3,591 | 152.00 | 4068.5 | |
| Mora | $3,530 | 707.50 | 4776.0 | |
| Roy | $3,516 | 113.00 | 4889.0 | |
| Logan | $3,484 | 278.00 | 5167.0 | |
| Cuba | $3,404 | 773.00 | 5940.0 | |
| Silver City | $3,391 | 3837.50 | 9777.5 | |
| Texico | $3,335 | 498.00 | 10275.5 | |
| Zuni | $3,320 | 1696.00 | 11971.5 | |
| Springer | $3,295 | 285.50 | 12257.0 | |
| Jemez Valley | $3,286 | 513.50 | 12770.5 | |
| Ruidoso | $3,278 | 2408.00 | 15178.5 | |
| Tatum | $3,266 | 369.00 | 15547.5 | |
| Penasco | $3,259 | 709.50 | 16257.0 | $3,259 |
| Raton | $3,249 | 1479.50 | | |
| Tularosa | $3,246 | 1140.50 | | |
| Bernalillo | $3,244 | 3528.50 | | |
| Las Vegas West | $3,241 | 2130.50 | | |
| Mesa Vista | $3,233 | 572.00 | | |
| Hatch | $3,206 | 1410.50 | | |
| Loving | $3,204 | 556.50 | | |

| DIST. | REV/ MEM. | TOTAL MEM. | CUM. MEM. | REV/MEM AT 95/5% |
|---|---|---|---|---|
| Mountainair | $3,195 | 365.00 | | |
| Cobre | $3,194 | 2067.00 | | |
| Melrose | $3,187 | 287.50 | | |
| Taos | $3,164 | 3326.50 | | |
| Pojoaque | $3,155 | 1937.50 | | |
| Wagon Mound | $3,154 | 185.00 | | |
| Carlsbad | $3,152 | 6690.00 | | |
| Clayton | $3,151 | 732.50 | | |
| Espanola | $3,147 | 4920.50 | | |
| Jemez Mountain | $3,123 | 415.50 | | |
| Las Vegas City | $3,122 | 2623.50 | | |
| Ft. Sumner | $3,100 | 428.00 | | |
| Magdalena | $3,092 | 377.50 | | |
| Jal | $3,091 | 534.00 | | |
| Cimarron | $3,088 | 666.50 | | |
| Reserve | $3,087 | 270.00 | | |
| Lordsburg | $3,074 | 860.50 | | |
| Albuquerque | $3,071 | 83709.50 | | |
| Chama | $3,065 | 620.00 | | |
| San Jon | $3,059 | 217.50 | | |
| Questa | $3,054 | 638.50 | | |
| Santa Fe | $3,050 1 | 3044.00 | | |
| Grants | $3,035 | 3699.00 | | |
| Pecos | $3,033 | 878.50 | | |
| Central | $3,027 | 314.00 | | |
| Santa Rosa | $3,011 | 860.00 | | |
| Elida | $3,006 | 127.00 | | |
| Estancia | $3,002 | 950.00 | | |
| Dora | $2,996 | 254.00 | | |

| DIST. | REV/ MEM. | TOTAL MEM. | CUM. MEM. | REV/MEM AT 95/5% |
|---|---|---|---|---|
| Roswell | $2,992 | 10528.50 | | |
| Clovis | $2,983 | 8639.50 | | |
| Alamogordo | $2,982 | 7824.50 | | |
| Tucumcari | $2,975 | 1526.50 | | |
| Animas | $2,975 | 580.50 | | |
| Portales | $2,975 | 2806.50 | | |
| Las Cruces | $2,974 | 21365.50 | | |
| Socorro | $2,968 | 2204.50 | | |
| Bloomfield | $2,968 | 3358.50 | | |
| Artesia | $2,964 | 3861.00 | | |
| Lovington | $2,963 | 2909.00 | | |
| Capitan | $2,962 | 622.50 | | |
| Rio Rancho | $2,959 | 8590.50 | | |
| Belen | $2,948 | 4732.50 | | |
| Farmington | $2,948 | 10153.00 | | |
| Truth or Cons. | $2,945 | 1771.00 | | |
| Aztec | $2,942 | 3283.50 | | |
| House | $2,936 | 119.00 | | |
| Grady | $2,915 | 159.50 | | |
| Deming | $2,912 | 5326.00 | | |
| Los Lunas | $2,887 | 7946.50 | | |
| Cloudcroft | $2,884 | 545.00 | | |
| Dexter | $2,883 | 1161.50 | | |
| Carrizozo | $2,880 | 222.50 | | |
| Moriarty | $2,870 | 4643.50 | | |
| Gallup | $2,861 | 13815.00 | | |
| Quemado | $2,858 | 214.50 | | |
| Eunice | $2,849 | 780.00 | | |
| Hobbs | $2,848 | 8114.50 | 22012.0 | $2,848 |
| Gadsen | $2,829 | 12000.50 | 13897.5 | |
| Lake Arthur | $2,787 | 245.50 | 1897.0 | |

| DIST. | REV/ MEM. | TOTAL MEM. | CUM. MEM. | REV/MEM AT 95/5% |
|---|---|---|---|---|
| Dulce | $2,783 | 718.00 | 1,651.5 | |
| Hagerman | $2,777 | 475.50 | 933.5 | |
| Floyd | $2,725 | 261.50 | 458.0 | |
| Des Moines | $2,672 | 196.50 | 196.5 | |
| TOTAL: | | 317,777.00 | | $411 |
| | 5% OF MEM | 15,888.85 | DISPARITY | 14.43% |

**[FOLD OUT EXHIBITS]**

**NEW MEXICO STATE DEPARTMENT OF EDUCATION**
**SCHOOL BUDGET PLANNING UNIT**

**IMPACT AID DISPARITY FOR 1999-2000**
**Revenue Per Mem**

| DISTRICT | TOTAL 97-98 ACTUAL REVENUE | LESS ADJUSTMENTS | TOTAL REVENUE | FINAL FUND. MEM 1997-98 | REVENUE PER MEM | LOCAL TAX @ 100% | LOCAL TAX @ 95% | PROPORTIONATE |
|---|---|---|---|---|---|---|---|---|
| ALAMOGORDO | $27,446,631 | $4,115,459 | $23,331,172 | 7,824.5 | $2,982 | $133,143 | $126,486 | 95% |
| ALBUQUERQUE | $355,152,532 | $98,088,787 | $257,063,745 | 83,709.5 | $3,071 | $2,256,344 | $2,143,527 | 95% |
| ANIMAS | $2,588,924 | $862,085 | $1,726,839 | 580.5 | $2,975 | $27,124 | $25,767 | 95% |
| ARTESIA | $14,952,365 | $3,508,519 | $11,443,846 | 3,861.0 | $2,964 | $222,304 | $211,189 | 95% |
| AZTEC | $12,780,033 | $3,119,813 | $9,660,220 | 3,283.5 | $2,942 | $247,947 | $235,550 | 95% |
| BELEN | $19,393,872 | $5,440,482 | $13,953,390 | 4,732.5 | $2,948 | $79,459 | $75,486 | 95% |
| BERNALILLO | $17,482,873 | $6,034,894 | $11,447,979 | 3,528.5 | $3,244 | $56,401 | $53,581 | 95% |
| BLOOMFIELD | $13,219,439 | $3,251,321 | $9,968,119 | 3,358.5 | $2,968 | $234,944 | $223,197 | 95% |
| CAPITAN | $2,833,986 | $989,858 | $1,844,129 | 622.5 | $2,962 | $30,545 | $29,018 | 95% |
| CARLSBAD | $26,617,832 | $5,531,595 | $21,086,237 | 6,690.0 | $3,152 | $293,479 | $278,805 | 95% |
| CARRIZOZO | $1,277,194 | $636,396 | $640,798 | 222.5 | $2,880 | $8,393 | $7,974 | 95% |
| CENTRAL | $30,281,982 | $8,142,267 | $22,139,715 | 7,314.0 | $3,027 | $333,583 | $316,885 | 95% |
| CHAMA | $3,455,987 | $1,555,382 | $1,900,605 | 620.0 | $3,065 | $17,725 | $16,839 | 95% |
| CIMARRON | $3,505,455 | $1,447,247 | $2,058,208 | 666.5 | $3,088 | $51,158 | $48,600 | 95% |
| CLAYTON | $3,713,964 | $1,405,494 | $2,308,470 | 732.5 | $3,151 | $28,795 | $27,355 | 95% |
| CLOUDCROFT | $2,652,829 | $1,081,156 | $1,571,674 | 545.0 | $2,884 | $20,619 | $19,588 | 95% |
| CLOVIS | $32,373,972 | $6,603,789 | $25,770,183 | 8,639.5 | $2,983 | $145,158 | $137,900 | 95% |
| COBRE | $9,905,682 | $3,303,914 | $6,601,768 | 2,067.0 | $3,194 | $90,292 | $85,778 | 95% |
| CORONA | $779,112 | $310,048 | $469,064 | 81.0 | $5,791 | $10,304 | $9,789 | 95% |
| CUBA | $3,923,360 | $1,292,096 | $2,631,264 | 773.0 | $3,404 | $16,037 | $15,235 | 95% |
| DEMING | $18,959,647 | $5,448,508 | $15,511,138 | 5,326.0 | $2,912 | $93,124 | $88,468 | 95% |
| DES MOINES | $1,091,120 | $566,100 | $525,020 | 196.5 | $2,672 | $5,912 | $5,617 | 95% |
| DEXTER | $5,322,191 | $1,973,447 | $3,348,744 | 1,161.5 | $2,883 | $9,445 | $8,972 | 95% |
| DORA | $1,424,437 | $663,466 | $760,970 | 254.0 | $2,996 | $8,371 | $7,952 | 95% |
| DULCE | $3,387,408 | $1,388,959 | $1,998,449 | 718.0 | $2,783 | $140,171 | $133,163 | 95% |
| ELIDA | $818,605 | $436,866 | $381,739 | 127.0 | $3,006 | $5,995 | $5,696 | 95% |
| ESPANOLA | $22,131,602 | $8,647,050 | $15,484,552 | 4,920.5 | $3,147 | $49,807 | $47,317 | 95% |
| ESTANCIA | $4,225,955 | $1,373,784 | $2,852,171 | 950.0 | $3,002 | $19,076 | $18,122 | 95% |
| EUNICE | $3,271,027 | $1,048,902 | $2,222,125 | 780.0 | $2,849 | $111,466 | $105,893 | 95% |
| FARMINGTON | $37,577,106 | $7,645,084 | $29,932,022 | 10,153.0 | $2,948 | $259,992 | $246,992 | 95% |
| FLOYD | $1,467,386 | $754,895 | $712,491 | 261.5 | $2,725 | $4,154 | $3,946 | 95% |
| FT. SUMNER | $2,250,063 | $923,131 | $1,326,932 | 428.0 | $3,100 | $14,517 | $13,791 | 95% |
| GADSDEN | $45,597,839 | $11,644,365 | $33,953,474 | 12,000.5 | $2,829 | $105,138 | $99,881 | 95% |
| GALLUP | $50,663,804 | $11,137,616 | $39,526,188 | 13,815.0 | $2,861 | $247,756 | $235,369 | 95% |
| GRADY | $958,518 | $493,640 | $464,877 | 159.5 | $2,915 | $3,448 | $3,276 | 95% |
| GRANTS | $14,731,619 | $3,506,337 | $11,225,282 | 3,699.0 | $3,035 | $61,694 | $58,609 | 95% |
| HAGERMAN | $2,531,488 | $1,210,855 | $1,320,633 | 475.5 | $2,777 | $5,903 | $5,608 | 95% |
| HATCH | $6,451,667 | $1,929,754 | $4,521,913 | 1,410.5 | $3,206 | $13,244 | $12,581 | 95% |
| HOBBS | $27,886,255 | $4,774,099 | $23,112,156 | 8,114.5 | $2,848 | $188,991 | $179,542 | 95% |
| HONDO VALLEY | $1,099,892 | $518,757 | $581,135 | 157.5 | $3,690 | $4,654 | $4,422 | 95% |

NEW MEXICO STATE DEPARTMENT OF EDUCATION
SCHOOL BUDGET PLANNING UNIT

IMPACT AID DISPARITY FOR 1999-2000
Revenue Per Mem

| DISTRICT | TOTAL 97-98 ACTUAL REVENUE | LESS ADJUSTMENTS | TOTAL REVENUE | FINAL FUND. MEM 1997-98 | REVENUE PER MEM | LOCAL TAX @ 100% | LOCAL TAX @ 95% | PROPORTIONATE |
|---|---|---|---|---|---|---|---|---|
| HOUSE | $818,919 | $469,528 | $349,391 | 119.0 | $2,936 | $3,307 | $3,142 | 95% |
| JAL | $2,695,814 | $1,045,179 | $1,650,636 | 534.0 | $3,091 | $63,170 | $60,012 | 95% |
| JEMEZ MOUNTAIN | $2,441,945 | $1,144,170 | $1,297,775 | 415.5 | $3,123 | $69,359 | $65,891 | 95% |
| JEMEZ VALLEY | $2,891,931 | $1,204,332 | $1,687,599 | 513.5 | $3,286 | $14,311 | $13,595 | 95% |
| LAKE ARTHUR | $1,416,847 | $732,657 | $684,190 | 245.5 | $2,787 | $6,410 | $6,090 | 95% |
| LAS CRUCES | $88,720,575 | $25,187,046 | $63,533,529 | 21,385.5 | $2,974 | $369,988 | $351,489 | 95% |
| LAS VEGAS CITY | $10,638,625 | $2,447,230 | $8,191,395 | 2,623.5 | $3,122 | $39,530 | $37,553 | 95% |
| LAS VEGAS WEST | $10,177,339 | $3,272,644 | $6,904,695 | 2,130.5 | $3,241 | $27,099 | $25,744 | 95% |
| LOGAN | $1,660,507 | $691,889 | $968,618 | 278.0 | $3,484 | $10,216 | $9,705 | 95% |
| LORDSBURG | $4,652,573 | $2,007,819 | $2,644,754 | 860.5 | $3,074 | $22,263 | $21,150 | 95% |
| LOS ALAMOS | $22,793,375 | $3,102,738 | $19,690,637 | 3,509.5 | $5,611 | $100,032 | $95,030 | 95% |
| LOS LUNAS | $31,568,300 | $8,627,261 | $22,941,039 | 7,946.5 | $2,887 | $61,545 | $58,468 | 95% |
| LOVING | $3,084,897 | $1,301,905 | $1,782,992 | 556.5 | $3,204 | $30,104 | $28,599 | 95% |
| LOVINGTON | $11,446,715 | $2,827,811 | $8,618,904 | 2,909.0 | $2,963 | $144,215 | $137,005 | 95% |
| MAGDALENA | $2,361,746 | $1,194,347 | $1,167,399 | 377.5 | $3,092 | $3,983 | $3,784 | 95% |
| MAXWELL | $1,158,007 | $612,182 | $545,825 | 152.0 | $3,591 | $2,149 | $2,041 | 95% |
| MELROSE | $1,598,797 | $682,580 | $916,216 | 287.5 | $3,187 | $8,015 | $7,615 | 95% |
| MESA VISTA | $3,520,610 | $1,671,283 | $1,849,327 | 572.0 | $3,233 | $8,632 | $8,200 | 95% |
| MORA | $3,626,850 | $1,129,471 | $2,497,379 | 707.5 | $3,530 | $8,824 | $8,383 | 95% |
| MORIARTY | $18,601,821 | $5,273,033 | $13,328,788 | 4,643.5 | $2,870 | $66,971 | $63,623 | 95% |
| MOSQUERO | $627,328 | $255,702 | $371,626 | 57.0 | $6,520 | $7,936 | $7,540 | 95% |
| MOUNTAINAIR | $2,087,915 | $921,909 | $1,166,006 | 365.0 | $3,195 | $9,258 | $8,796 | 95% |
| PECOS | $4,431,162 | $1,767,050 | $2,664,111 | 878.5 | $3,033 | $6,496 | $6,172 | 95% |
| PENASCO | $3,762,462 | $1,450,107 | $2,312,354 | 709.5 | $3,259 | $4,159 | $3,951 | 95% |
| POJOAQUE | $8,684,315 | $2,571,544 | $6,112,771 | 1,937.5 | $3,155 | $25,618 | $24,337 | 95% |
| PORTALES | $10,668,358 | $2,319,925 | $8,348,433 | 2,806.5 | $2,975 | $41,181 | $39,122 | 95% |
| QUEMADO | $1,270,005 | $656,865 | $613,140 | 214.5 | $2,858 | $14,694 | $13,959 | 95% |
| QUESTA | $3,678,133 | $1,728,320 | $1,949,813 | 638.5 | $3,054 | $28,557 | $27,129 | 95% |
| RATON | $6,362,397 | $1,555,192 | $4,807,205 | 1,479.5 | $3,249 | $24,367 | $23,168 | 95% |
| RESERVE | $1,544,789 | $711,225 | $833,564 | 270.0 | $3,087 | $13,891 | $13,196 | 95% |
| RIO RANCHO | $36,359,033 | $10,939,463 | $25,419,570 | 8,590.5 | $2,959 | $135,825 | $129,034 | 95% |
| ROSWELL | $42,279,732 | $10,776,349 | $31,503,383 | 10,528.5 | $2,992 | $164,977 | $156,728 | 95% |
| ROY | $802,650 | $405,342 | $397,308 | 113.0 | $3,516 | $2,400 | $2,280 | 95% |
| RUIDOSO | $10,935,125 | $3,041,764 | $7,893,362 | 2,408.0 | $3,278 | $78,872 | $74,928 | 95% |
| SAN JON | $1,222,925 | $557,631 | $665,294 | 217.5 | $3,059 | $4,497 | $4,272 | 95% |
| SANTA FE | $50,902,545 | $11,111,834 | $39,790,712 | 13,044.0 | $3,050 | $432,979 | $411,330 | 95% |
| SANTA ROSA | $4,734,907 | $2,145,098 | $2,589,808 | 860.0 | $3,011 | $18,992 | $18,042 | 95% |
| SILVER CITY | $17,249,457 | $4,235,965 | $13,013,492 | 3,837.5 | $3,391 | $97,480 | $92,606 | 95% |
| SOCORRO | $8,761,785 | $2,218,137 | $6,543,648 | 2,204.5 | $2,968 | $24,120 | $22,914 | 95% |
| SPRINGER | $1,807,048 | $866,329 | $940,720 | 285.5 | $3,295 | $5,676 | $5,392 | 95% |

NEW MEXICO STATE DEPARTMENT OF EDUCATION
SCHOOL BUDGET PLANNING UNIT

IMPACT AID DISPARITY FOR 1999-2000
Revenue Per Mem

| DISTRICT | TOTAL 97-98 ACTUAL REVENUE | LESS ADJUSTMENTS | TOTAL REVENUE | FINAL FUND. MEM 1997-98 | REVENUE PER MEM | LOCAL TAX @ 100% | LOCAL TAX @ 95% | PROPORTIONATE |
|---|---|---|---|---|---|---|---|---|
| TAOS | $14,603,382 | $4,077,346 | $10,526,035 | 3,326.5 | $3,164 | $54,404 | $51,684 | 95% |
| TATUM | $2,220,520 | $1,015,468 | $1,205,052 | 369.0 | $3,266 | $21,179 | $20,120 | 95% |
| TEXICO | $2,679,551 | $1,018,537 | $1,661,014 | 498.0 | $3,335 | $12,313 | $11,697 | 95% |
| TRUTH OR CONS. | $7,305,203 | $2,088,750 | $5,216,453 | 1,771.0 | $2,945 | $64,554 | $61,326 | 95% |
| TUCUMCARI | $6,633,341 | $2,092,067 | $4,541,274 | 1,526.5 | $2,975 | $28,865 | $27,422 | 95% |
| TULAROSA | $5,557,250 | $1,855,101 | $3,702,149 | 1,140.5 | $3,246 | $13,563 | $12,885 | 95% |
| VAUGHN | $1,142,718 | $625,197 | $517,521 | 111.5 | $4,641 | $14,913 | $14,167 | 95% |
| WAGON MOUND | $1,383,474 | $798,497 | $584,977 | 185.5 | $3,154 | $4,537 | $4,310 | 95% |
| ZUNI | $8,597,151 | $2,966,646 | $5,630,505 | 1,696.0 | $3,320 | $1,010 | $960 | 95% |
| TOTALS: | $1,330,356,506 | 360,204,681.900 | $970,151,824 | 317,777.00 | $3,192 | $8,074,051 | $7,670,348 | 95% |

**NEW MEXICO STATE DEPARTMENT OF EDUCATION**
**SCHOOL BUDGET PLANNING UNIT**

**IMPACT AID DISPARITY FOR 1999-2000**
**DISPARITY ADJUSTMENTS**

| 1997-98 FINAL FUNDED MEM | BILINGUAL UNITS | A/B UNITS | RELATED SERV. UNITS | 3Y/4Y DD UNITS | C UNITS | D UNITS | SAVE HARMLESS | DNPTC | TOTAL SIZE | GROWTH | AT-RISK UNITS | TOTAL ADJUSTMENTS | TIMES $2,178.00 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| ALAMOGORDO | 22.415 | 559.300 | 328.000 | 232.000 | 355.000 | 234.000 | 0.000 | 0.000 | 41.388 | 0.000 | 122.062 | 1,892.165 | $4,115,459 |
| ALBUQUERQUE | 5,835.085 | 6,180.300 | 12,351.250 | 1,112.000 | 3,511.000 | 9,404.000 | 0.000 | 6.000 | 0.995 | 0.000 | 6,897.663 | 45,098.293 | $98,088,787 |
| ANIMAS | 0.000 | 28.000 | 20.000 | 12.000 | 25.000 | 24.000 | 0.000 | 0.000 | 275.809 | 0.000 | 11.552 | 396.361 | $862,085 |
| ARTESIA | 201.585 | 334.600 | 365.250 | 132.000 | 109.000 | 144.000 | 0.000 | 0.000 | 144.438 | 0.000 | 182.239 | 1,613.112 | $3,508,519 |
| AZTEC | 0.000 | 338.100 | 387.750 | 92.000 | 144.000 | 164.000 | 0.000 | 0.000 | 88.224 | 0.000 | 220.323 | 1,434.397 | $3,119,813 |
| BELEN | 84.165 | 246.400 | 967.500 | 62.000 | 140.000 | 610.000 | 0.000 | 0.000 | 0.000 | 27.500 | 383.806 | 2,501.371 | $5,440,482 |
| BERNALILLO | 703.665 | 147.000 | 531.500 | 92.000 | 195.000 | 324.000 | 0.000 | 4.000 | 286.332 | 0.000 | 491.167 | 2,774.664 | $6,034,894 |
| BLOOMFIELD | 105.665 | 288.300 | 250.750 | 170.000 | 190.000 | 142.000 | 0.000 | 0.000 | 80.793 | 0.000 | 269.352 | 1,494.860 | $3,251,321 |
| CAPITAN | 0.000 | 78.400 | 50.250 | 10.000 | 5.000 | 4.000 | 0.000 | 0.000 | 279.624 | 17.250 | 10.583 | 455.107 | $989,858 |
| CARLSBAD | 126.835 | 771.400 | 578.750 | 146.000 | 186.000 | 460.000 | 0.000 | 0.000 | 49.500 | 0.000 | 222.777 | 2,543.262 | $5,531,595 |
| CARRIZOZO | 0.000 | 21.700 | 15.250 | 12.000 | 7.000 | 12.000 | 0.000 | 0.000 | 208.852 | 7.250 | 8.544 | 292.596 | $636,398 |
| CENTRAL | 602.335 | 408.800 | 1,004.500 | 176.000 | 353.000 | 442.000 | 0.000 | 0.000 | 136.998 | 67.000 | 552.938 | 3,743.571 | $8,142,287 |
| CHAMA | 30.835 | 41.300 | 73.000 | 12.000 | 15.000 | 18.000 | 0.000 | 0.000 | 442.987 | 6.500 | 75.516 | 715.118 | $1,555,382 |
| CIMARRON | 12.335 | 32.200 | 85.500 | 30.000 | 35.000 | 16.000 | 0.000 | 0.000 | 440.436 | 0.000 | 13.930 | 665.401 | $1,447,247 |
| CLAYTON | 0.000 | 73.500 | 106.000 | 48.000 | 22.000 | 20.000 | 0.000 | 0.000 | 384.032 | 0.000 | 12.672 | 648.204 | $1,409,494 |
| CLOUDCROFT | 0.000 | 60.900 | 47.500 | 10.000 | .000 | 30.000 | 0.000 | 0.000 | 306.784 | 0.000 | 33.899 | 497.083 | $1,081,158 |
| CLOVIS | 82.415 | 671.300 | 636.500 | 304.000 | 485.000 | 298.000 | 0.000 | 0.000 | 80.000 | 0.000 | 527.010 | 3,036.225 | $6,603,789 |
| COBRE | 312.750 | 130.900 | 345.500 | 26.000 | 102.000 | 136.000 | 0.000 | 0.000 | 240.795 | 0.000 | 225.096 | 1,519.041 | $3,303,914 |
| CORONA | 3.915 | 7.000 | 10.250 | 2.000 | 2.000 | 10.000 | 0.057 | 0.000 | 103.242 | 0.750 | 3.337 | 142.551 | $310,048 |
| CUBA | 54.500 | 27.300 | 91.250 | 28.000 | 56.000 | 76.000 | 0.000 | 0.000 | 183.773 | 11.750 | 85.494 | 594.067 | $1,292,096 |
| DEMING | 305.085 | 69.300 | 130.500 | 50.000 | 178.000 | 354.000 | 0.000 | 0.000 | 42.198 | 0.000 | 456.438 | 1,585.521 | $3,448,508 |
| DES MOINES | 0.000 | 15.400 | 29.000 | 2.000 | 8.000 | 4.000 | 0.000 | 0.000 | 191.191 | 6.500 | 4.185 | 260.276 | $566,100 |
| DEXTER | 45.335 | 99.400 | 187.750 | 66.000 | 74.000 | 84.000 | 0.000 | 0.000 | 249.998 | 10.750 | 120.099 | 907.332 | $1,973,447 |
| DORA | 0.000 | 12.600 | 14.500 | 34.000 | 4.000 | 8.000 | 0.000 | 0.000 | 228.132 | 0.000 | 3.810 | 305.042 | $663,466 |
| DULCE | 54.085 | 23.100 | 50.000 | 16.000 | 47.000 | 44.000 | 0.000 | 0.000 | 289.704 | 25.250 | 89.463 | 638.602 | $1,388,959 |
| ELIDA | 0.000 | 20.300 | 3.500 | 4.000 | 4.000 | 0.000 | 16.089 | 0.000 | 146.350 | 2.250 | 4.389 | 200.858 | $436,868 |
| ESPANOLA | 825.165 | 202.300 | 650.000 | 66.000 | 145.000 | 312.000 | 0.000 | 0.000 | 226.318 | 0.000 | 629.332 | 3,056.115 | $6,647,050 |
| ESTANCIA | 5.335 | 61.600 | 120.250 | 36.000 | 27.000 | 36.000 | 0.000 | 0.000 | 291.740 | 22.250 | 29.450 | 631.625 | $1,373,784 |
| EUNICE | 8.665 | 47.600 | 50.500 | 40.000 | 20.000 | 60.000 | 0.000 | 0.000 | 240.981 | 0.000 | 14.508 | 482.254 | $1,048,902 |
| FARMINGTON | 538.000 | 634.200 | 679.750 | 212.000 | 377.000 | 342.000 | 0.000 | 0.000 | 0.000 | 0.000 | 732.031 | 3,514.981 | $7,645,084 |
| FLOYD | 10.750 | 36.400 | 8.250 | 40.000 | 9.000 | 4.000 | 0.000 | 0.000 | 223.328 | 0.000 | 15.350 | 347.078 | $754,895 |
| FT. SUMNER | 0.000 | 71.400 | 17.000 | 18.000 | 11.000 | 8.000 | 0.000 | 0.000 | 288.145 | 0.000 | 12.883 | 424.428 | $923,131 |
| GADSDEN | 926.085 | 543.900 | 1,436.500 | 318.000 | 484.000 | 548.000 | 0.000 | 0.000 | 0.000 | 0.000 | 1,099.248 | 5,353.731 | $11,644,365 |
| GALLUP-McKINLEY | 415.165 | 639.100 | 884.500 | 442.000 | 572.000 | 514.000 | 0.000 | 0.000 | 535.622 | 0.000 | 1,138.356 | 5,120.743 | $11,137,818 |
| GRADY | 0.000 | 17.500 | 7.500 | 2.000 | 0.000 | 2.000 | 14.418 | 0.000 | 180.002 | 0.000 | 3.541 | 226.961 | $493,640 |
| GRANTS-CIBOLA | 55.915 | 130.900 | 273.000 | 84.000 | 101.000 | 194.000 | 0.000 | 0.000 | 398.585 | 0.000 | 374.709 | 1,612.109 | $3,506,337 |
| HAGERMAN | 46.165 | 43.400 | 91.000 | 34.000 | 12.000 | 14.000 | 0.000 | 0.000 | 246.662 | 5.000 | 64.288 | 556.715 | $1,210,855 |
| HATCH | 244.585 | 51.800 | 64.250 | 48.000 | 47.000 | 74.000 | 0.000 | 0.000 | 217.827 | 0.000 | 139.781 | 887.243 | $1,929,754 |
| HOBBS | 31.500 | 508.200 | 583.250 | 168.000 | 267.000 | 326.000 | 0.000 | 0.000 | 31.088 | 0.000 | 279.950 | 2,194.988 | $4,774,099 |
| HONDO VALLEY | 6.500 | 29.400 | 12.000 | 10.000 | 1.000 | 0.000 | 4.588 | 0.000 | 172.406 | 0.000 | 2.615 | 238.509 | $518,737 |
| HOUSE | 0.000 | 13.300 | 9.750 | 8.000 | 1.000 | 12.000 | 26.005 | 0.000 | 144.035 | 0.000 | 1.785 | 215.875 | $469,528 |
| JAL | 0.000 | 47.600 | 68.750 | 32.000 | 29.000 | 12.000 | 0.000 | 0.000 | 271.007 | 0.000 | 20.185 | 480.542 | $1,045,179 |
| JEMEZ MOUNTAIN | 45.165 | 13.300 | 13.250 | 0.000 | 11.000 | 22.000 | 0.000 | 0.000 | 382.200 | 0.000 | 39.140 | 526.055 | $1,144,170 |
| JEMEZ VALLEY | 39.085 | 39.900 | 36.500 | 20.000 | 19.000 | 52.000 | 0.000 | 0.000 | 296.394 | 0.000 | 60.837 | 553.716 | $1,204,332 |
| LAKE ARTHUR | 4.665 | 22.400 | 40.000 | 6.000 | 5.000 | 12.000 | 0.000 | 0.000 | 231.421 | 0.000 | 15.368 | 336.854 | $732,657 |
| LAS CRUCES | 397.250 | 2,161.900 | 3,645.750 | 396.000 | 610.000 | 2,576.000 | 0.000 | 0.000 | 49.155 | 0.000 | 1,734.196 | 11,580.281 | $25,197,046 |
| LAS VEGAS CITY | 244.165 | 171.500 | 224.250 | 26.000 | 66.000 | 88.000 | 0.000 | 0.000 | 177.422 | 0.000 | 107.826 | 1,125.163 | $2,447,230 |

**NEW MEXICO STATE DEPARTMENT OF EDUCATION**
**SCHOOL BUDGET PLANNING UNIT**

**IMPACT AID DISPARITY FOR 1999-2000**
**DISPARITY ADJUSTMENTS**

| 1997-98 FINAL FUNDED MEM | BILINGUAL UNITS | A/B UNITS | RELATED SERV. UNITS | 3Y/4Y DD UNITS | C UNITS | D UNITS | SAVE HARMLESS | DNPTC | TOTAL SIZE | GROWTH | AT-RISK UNITS | TOTAL ADJUSTMENTS | TIMES $2,175.00 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| LAS VEGAS WEST | 326.835 | 77.000 | 238.500 | 28.000 | 88.000 | 174.000 | 0.000 | 0.000 | 312.224 | 25.750 | 234.355 | 1,504.664 | $3,272,644 |
| LOGAN | 0.000 | 16.800 | 15.500 | 14.000 | 3.000 | 28.000 | 0.000 | 0.000 | 238.416 | 0.000 | 4.392 | 318.110 | $691,889 |
| LORDSBURG | 7.835 | 67.200 | 86.250 | 144.000 | 29.000 | 92.000 | 0.000 | 0.000 | 427.322 | 0.000 | 69.528 | 923.135 | $2,007,819 |
| LOS ALAMOS | 0.000 | 520.100 | 378.250 | 80.000 | 71.000 | 260.000 | 0.000 | 0.000 | 64.553 | 0.000 | 52.643 | 1,426.547 | $3,102,738 |
| LOS LUNAS | 364.335 | 357.700 | 1,288.500 | 218.000 | 250.000 | 862.000 | 0.000 | 0.000 | 0.000 | 131.750 | 494.272 | 3,966.557 | $8,627,261 |
| LOVING | 41.250 | 38.500 | 90.750 | 28.000 | 19.000 | 28.000 | 0.000 | 0.000 | 270.648 | 8.750 | 73.681 | 598.577 | $1,301,905 |
| LOVINGTON | 93.085 | 274.400 | 248.000 | 120.000 | 82.000 | 116.000 | 0.000 | 0.000 | 182.809 | 0.000 | 183.849 | 1,300.143 | $2,827,811 |
| MAGDALENA | 18.500 | 18.900 | 86.500 | 32.000 | 21.000 | 50.000 | 0.000 | 0.000 | 269.677 | 0.000 | 52.548 | 549.125 | $1,194,347 |
| MAXWELL | 0.000 | 23.800 | 45.250 | 12.000 | 7.000 | 4.000 | 0.000 | 0.000 | 167.859 | 9.500 | 12.054 | 281.463 | $612,182 |
| MELROSE | 0.000 | 42.000 | 4.000 | 14.000 | 2.000 | 4.000 | 0.000 | 0.000 | 235.525 | 0.000 | 12.305 | 313.830 | $682,580 |
| MESA VISTA | 135.000 | 17.500 | 51.000 | 4.000 | 28.000 | 56.000 | 0.000 | 0.000 | 398.256 | 0.000 | 78.850 | 768.406 | $1,671,283 |
| MORA | 81.835 | 58.700 | 55.000 | 16.000 | 3.000 | 4.000 | 0.000 | 0.000 | 280.829 | 0.000 | 21.933 | 519.297 | $1,129,471 |
| MORIARTY | 104.585 | 358.400 | 1,147.500 | 116.000 | 217.000 | 368.000 | 0.000 | 0.000 | 0.995 | 44.250 | 59.653 | 2,424.383 | $5,273,033 |
| MOSQUERO | 0.000 | 9.100 | 18.750 | 8.000 | 2.000 | 0.000 | 0.315 | 0.000 | 74.986 | 0.000 | 6.413 | 117.564 | $255,702 |
| MOUNTAINAIR | 0.000 | 28.000 | 83.000 | 20.000 | 13.000 | 32.000 | 0.000 | 0.000 | 231.158 | 3.750 | 12.958 | 423.866 | $921,909 |
| PECOS | 120.585 | 78.300 | 125.500 | 32.000 | 51.000 | 30.000 | 0.000 | 0.000 | 256.434 | 0.000 | 120.618 | 812.437 | $1,767,050 |
| [illegible]NASCO | 127.250 | 43.400 | 81.000 | 12.000 | 9.000 | 24.000 | 0.000 | 0.000 | 291.304 | 0.000 | 98.782 | 666.718 | $1,450,107 |
| [illegible]OJOAQUE | 283.415 | 125.300 | 253.500 | 20.000 | 65.000 | 76.000 | 0.000 | 0.000 | 149.854 | 0.000 | 209.250 | 1,182.319 | $2,571,544 |
| PORTALES | 34.665 | 200.200 | 235.250 | 74.000 | 111.000 | 124.000 | 0.000 | 0.000 | 174.896 | 0.000 | 112.621 | 1,066.632 | $2,319,925 |
| QUEMADO | 0.000 | 14.700 | 37.750 | 4.000 | 5.000 | 2.000 | 0.000 | 0.000 | 227.532 | 0.000 | 11.025 | 302.007 | $656,865 |
| QUESTA | 136.085 | 33.600 | 54.250 | 8.000 | 27.000 | 16.000 | 0.000 | 0.000 | 430.816 | 0.000 | 88.879 | 794.630 | $1,728,320 |
| RATON | 44.750 | 76.300 | 178.750 | 56.000 | 67.000 | 54.000 | 0.000 | 0.000 | 150.235 | 0.000 | 57.996 | 715.031 | $1,555,192 |
| RESERVE | 0.000 | 17.500 | 21.250 | 10.000 | 11.000 | 12.000 | 0.000 | 0.000 | 241.800 | 4.000 | 9.450 | 327.000 | $711,225 |
| RIO RANCHO | 99.000 | 517.300 | 1,394.500 | 172.000 | 176.000 | 856.000 | 0.000 | 4.000 | 0.000 | 1,178.000 | 634.838 | 5,029.638 | $10,939,483 |
| ROSWELL | 405.250 | 1,064.000 | 1,502.000 | 348.000 | 512.000 | 488.000 | 0.000 | 0.000 | 0.000 | 0.000 | 625.393 | 4,954.643 | $10,776,349 |
| ROY | 0.000 | 14.000 | 20.250 | 6.000 | 1.000 | 0.000 | 0.000 | 0.000 | 141.189 | 2.250 | 1.695 | 186.384 | $405,342 |
| RUIDOSO | 62.915 | 202.300 | 403.250 | 98.000 | 75.000 | 170.000 | 0.000 | 0.000 | 191.758 | 0.000 | 195.289 | 1,398.512 | $3,041,764 |
| SAN JON | 0.000 | 25.200 | 3.250 | 10.000 | 0.000 | 8.000 | 0.000 | 0.000 | 204.539 | 1.500 | 3.693 | 256.382 | $557,631 |
| SANTA FE | 337.835 | 1,023.400 | 1,307.250 | 126.000 | 335.000 | 834.000 | 0.000 | 0.000 | 147.106 | 78.000 | 918.298 | 5,108.889 | $11,111,834 |
| SANTA ROSA | 202.585 | 70.000 | 148.750 | 22.000 | 21.000 | 60.000 | 0.000 | 0.000 | 383.619 | 0.000 | 98.298 | 986.252 | $2,145,098 |
| SILVER CITY | 347.250 | 215.600 | 334.500 | 52.000 | 257.000 | 232.000 | 0.000 | 0.000 | 227.547 | 0.000 | 281.673 | 1,947.570 | $4,235,965 |
| SOCORRO | 19.585 | 118.300 | 129.000 | 64.000 | 123.000 | 112.000 | 0.000 | 2.000 | 248.685 | 12.750 | 192.453 | 1,019.833 | $2,218,137 |
| SPRINGER | 0.000 | [illegible]00 | 61.000 | 14.000 | 5.000 | 8.000 | 0.000 | 0.000 | 273.834 | 0.000 | 9.878 | 396.312 | $888,329 |
| TAOS | 323.915 | [illegible]30 | 342.000 | 108.000 | 120.000 | 260.000 | 0.000 | 0.000 | 166.883 | 0.000 | 325.684 | 1,874.642 | $4,077,346 |
| TATUM | 13.500 | [illegible].00 | 22.500 | 70.000 | 37.000 | 24.000 | 0.000 | 0.000 | 249.118 | 0.000 | 20.664 | 466.882 | $1,015,468 |
| TEXICO | 1.665 | [illegible]100 | 52.250 | 28.000 | 16.000 | 12.000 | 0.000 | 0.000 | 277.833 | 0.000 | 38.645 | 466.293 | $1,018,537 |
| TRUTH OR CONS. | 30.585 | 98.000 | 154.750 | 80.000 | 125.000 | 130.000 | 0.000 | 0.000 | 198.028 | 0.000 | 143.982 | 960.345 | $2,088,750 |
| TUCUMCARI | 10.250 | 85.400 | 114.250 | 70.000 | 47.000 | 182.000 | 0.000 | 0.000 | 320.928 | 0.000 | 132.042 | 961.870 | $2,092,067 |
| TULAROSA | 11.415 | 112.700 | 163.250 | 58.000 | 61.000 | 76.000 | 0.000 | 0.000 | 229.397 | 0.000 | 131.158 | 852.920 | $1,855,101 |
| VAUGHN | 0.000 | 15.400 | 35.500 | 6.000 | 7.000 | 4.000 | 73.278 | 0.000 | 131.774 | 0.000 | 14.495 | 287.447 | $625,197 |
| WAGON MOUND | 10.500 | 9.100 | 36.750 | 2.000 | 0.000 | 112.000 | 6.388 | 0.000 | 184.994 | 0.000 | 25.395 | 387.125 | $798,497 |
| ZUNI | 377.250 | 112.000 | 116.000 | 30.000 | 87.000 | 100.000 | 0.000 | 0.000 | 307.142 | 16.500 | 236.083 | 1,363.975 | $2,966,648 |
| | 16,382.755 | 22,697.500 | 38,704.500 | 7,360.000 | 12,240.000 | 24,328.000 | 141.138 | 16.000 | 18,375.135 | 1,724.750 | 23,641.572 | 165,611.348 | $360,204,692 |

ATTACHMENT 2

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF ELEMENTARY AND SECONDARY EDUCATION

Honorable Michael J. Davis
Superintendent of Public Instruction
Department of Education Building
New Mexico State Department of Education
Sante Fe, New Mexico 87501-2786

Dear Superintendent Davis:

Enclosed is a certification and related report confirming that New Mexico meets the requirements of Section 8009(b) of the Elementary and Secondary Education Act 1965 (20 U.S.C. § 7709) and is eligible to consider a portion of Impact Aid payments as local resources in determining State aid entitlements for the period July 1, 1999 -June 30, 2000(fiscal year 2000)

A copy of the certification and report is being sent to all school districts in New Mexico to inform them of their right to a hearing.

Sincerely,

/s/
Catherine Schagh, Director
Impact Aid Program

Enclosures

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF ELEMENTARY AND SECONDARY EDUCATION

# NOTICE OF CERTIFICATION UNDER SECTION 8009(b) OF THE ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965 (20 U.S.C. § 7709(b))

State — New Mexico

Period of Certification —July 1, 1999- June 30, 2000

As further described in the enclosed report, we have determined that New Mexico is eligible to take into consideration Impact Aid payments in determining State aid to local educational agencies in accordance with section 8009(b) of the Elementary and Secondary Education Act of 1965, as amended by the Improving America's Schools Act of 1994 (20 U.S.C. § 7709(b)) for the period noted above.

Any local educational agency adversely affected by this action may request, in writing and within 30 days of the receipt of this notice, a hearing under section 8009(c)(3)(B) and 34 C.F.R. § 222.165. A request for a hearing should be sent to: Director, Impact Aid Program, U.S. Department of Education, 400 Maryland Avenue, S.W., Washington, D.C. 20202-6244.

/s/
Catherine Schagh, Director
Impact Aid Program

Enclosure

# REPORT FOR THE YEAR JULY 1, 9999–JUNE 30, 2000 (STATE FISCAL YEAR 2000) UNDER SECTION 8009(b) OF THE ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965 AS AMENDED BY THE IMPROVING AMERICA'S SCHOOLS ACT OF 1994 (20 U.S.C. § 7709(b))

State — New Mexico

## Section I. Background

### A. Procedural History

By letter dated February 10, 1999, the Director, School Budget Planning Unit, Department of Education, State of New Mexico (State) notified the U.S. Department of Education (Department) and all Impact Aid applicants in the State of its intention to take Impact Aid payments into consideration in the calculation of State school aid for the period of July 1, 1999 - June 30, 2000 (State fiscal year (FY) 2000). The Department received final FY 1998 data from the State in support of the request for certification under section 8009(b) on February 22, 1999.

On April 13, 1999,the Department notified all local educational agencies (LEAs) in the State of their opportunity to request a hearing concerning the State's request. The Department received one request for a predetermination hearing; however, the LEA withdrew the request. This determination is based upon the data submitted by the State.

### B. State School Finance Formula

The current public school funding formula used by the State was first implemented in 1974 and has been revised since then

to make adjustments to the original formula and add new factors related to the educational needs of students and school districts in the State. However, it is essentially the same as it was when first adopted. The formula guarantees each school district 100 percent of a calculated program cost (need), regardless of the district's wealth. All districts levy a 0.5 mill general operational tax, but the vast majority (approximately 90 percent) of funds come from the State Equalization Guarantee and other State contributions.

The first step in the funding formula is to calculate each district's program cost. An instructional unit count is calculated for each district by adjusting the actual student membership by weighting factors that are associated with special categories of needs. The categories include early childhood education, grade levels of students, special education students, bilingual students, students considered to be at risk, district size and sparsity, growth factors and an index for instructional staff experience and training. The district's program cost is then determined by multiplying the district's instructional units by a set dollar figure per unit, which is established by the legislature.

Once each district's need is determined, most of the district's local revenues are Subtracted and the difference is the State's funding share for each district. New legislation enacted effective June 18, 1999 allows the State to consider 75 percent of eligible local resources of revenue and eligible Impact Aid funds. Of the remaining 25 percent, 5 percent will be available to the receiving district for operational use, and the remaining 20 percent will be set aside for capital outlay. Revenues subtracted from a district's need include 75 percent of the revenue raised from the 0.5 mill levy, 75 percent of Federal forest reserve funds and most of the district's Impact Aid receipts.

Section II. Description of Disparity Calculation

A. Disparity Test

A State may take into consideration Impact Aid payments in calculating State aid under section 8009(b) if the Secretary determines that the amount of per-pupil expenditures or revenues of the LEA with the highest per-pupil expenditures or revenues in the State did not exceed the per-pupil expenditures or revenues of the LEA with the lowest per-pupil expenditures or revenues by more than 25 percent. 20 U.S.C.§ 7709(b)(2)(A). As described below, New Mexico has satisfied this requirement for FY 2000.

In making this determination, we disregarded LEAs with expenditures or revenues above the95th percentile or below the 5th percentile of such revenues or expenditures in the State as required by the statute. See 20 U.S.C. § 7709(b)(2)(B)(i). As required by section 8009(b)(2)(ii), we also took into account the extent to which the State's program reflects the additional cost of providing free public education in particular types of LEAs or to particular types of students. First, we examined the weights used by the State in calculating instructional units to determine which of them qualify to be taken into account under section 8009(b)(2)(ii) and 34 C.F.R. § 222.162(c)(2). Only the additional allocations for Special Education, Bilingual Education, district size, growth and new district adjustments were considered to meet these standards. They were taken into account by excluding the revenues for these additional costs from the determination, as provided in 34 C.F.R. § 222.161(c)(3)(iii).

B. Fiscal year 1997 Data in Support of 1999 Request

According to the State's February 22, 1999, data, the revenue

per-pupil at the 95th percentile was $3,259.00 (Penasco) and the per-pupil revenue at the 5th percentile was 52,848.00 (Hobbs). The resulting disparity was 14.43 percent.

Section III. Findings

A. Based upon final FY 1998 data received by the Department on February 22, 1999, the New Mexico State aid formula is certified under section 8009(c)(3) for FY 2000. The revenue disparity is 14.43 percent, which is within the 25 percent disparity allowed under section 8009(b)(2).

B. Therefore, the State is certified to take into consideration Impact Aid payments when calculating State aid to districts for FY 2000. The State may not take into consideration the increased payment that results from the use of a weight of greater than 1.0 under subparagraph (B) of section 8003(a)(2) of the Act (children residing on Indian lands) or supplemental payments under section 8003(d) of the Act (children with disabilities), section 8003(f) of the Act (heavily impacted LEAs) and section 8003(g) of the Act (LEAs with high concentrations of children with severe ...disabilities). See 20 U.S.C. § 7709(b)(1). In addition, the State may not take into consideration increases in payment under the following subsections of 3(d) of the Act of September 30, 1950 (Pub. L. 81-874): Sections 3(d)(2)(B) (increases for heavily impacted local educational agencies); 3(d)(2)(C) (increases for handicapped, children and children with specific learning disabilities); 3(d)(2)(D) (increases for children residing on Indian lands); and 3(d)(3)(B)(ii) (increases for unusual geographical factors). The maximum proportion of payments that may be taken into consideration, calculated under section 8009(d)(1) for

each LEA, is available upon request from the State.

Report Prepared By: /s/ _____ 11/5/99
Carroll U. Dexter Date
Group Leader
Impact Aid Program

Report Accepted By: /s/ _____ 11/5/99
Catherine Schagh Date
Director
Impact Aid Program

ATTACHMENT 3

ZUNI PUBLIC SCHOOL DISTRICT #89

SUPERINTENDENT
Dr. David L. Cockerham

BOARD OF EDUCATION
Mr. Malcolm Bowekaty
Ms. Shelly C. Chimoni
Mrs. Margaret E. Garcia
Mrs. Carmelita A. Sanchez
Mrs. Ruby Wolf

October 25, 1999

Catherine Schagh, Director
Impact Aid Program
U.S. Department of Education
600 Maryland Avenue SW, Portals Rm. 4200
Washington, DC 20202-6244

Dear Ms. Schagh,

I would like to request; a hearing on the funding of Title VIII Impact Aid for the Zuni Public Schools, and the way the funding formula is distributed in our state.

**Section 8009. State Consideration of Payments in Providing State Aid.**

(B) OTHER FACTORS — In making a determination under the subsection, the Secretary shall —

(i) disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State;

It is my interpretation that this means New Mexico can only

take out the top 5% of the school districts (local educational agencies) and the bottom 5% of the school districts (local educational agencies). There are 89 school districts in New Mexico. Taking this into consideration, New Mexico State Department of Education can take five districts from the top and five districts from the bottom. In doing this, the state of New Mexico does not meet the 25% disparity. (See the enclosed New Mexico State Department of Education listing.)

The state of New Mexico is taking credit for kindergarten students from Title VIII Impact Aid funds at the full-time rate and reimbursing our district at a half time rate. Last year's Title VIII Impact Aid rate for Zunf Public Schools was about $2,800. The State of New Mexico reimburses the Zuni Public School District through the state equalization for one kindergarden student at a rate of $1,660.

In the allocation of state funds a state must take into consideration the vast difference in the amount Zuni Public Schools can raise in taxes. This is a great disparity. We need to be able to use our Impact Aid Program money to help us educate our students, build to outdated school facilities, renovate existing facilities, and acquire much needed equipment for our district. Redistributing our federal funds can address these needs in addition to helping all New Mexico districts.

I am looking forward to hearing from you.

Sincerely,

/s/
Dr. David L. Cockerham
Superintendent

ATTACHMENT 4

GALLUP-McKINLEY COUNTY PUBLIC SCHOOLS
GALLUP, NEW MEXICO 87305-1318

ROBERT GOMEZ
SUPERINTENDENT

ANGELO DiPAOLO
ASSISTANT TO THE SUPERINTENDENT

November 8, 1999

Catherine Schagh, Director
Impact Aid Program
United States Department of Education
600 Independence Avenue, SW
Washington, DC 20202-6244

Dear Ms. Schagh:

The Gallup-McKinley County School District requests a hearing on the New Mexico state application for equalized funding. Under contention is the following:

> Section 8009— Federal Register
> 222.163 The state may reduce state aid in a limited amount equal to a specified portion of certain Impact Aid receipts. Specifically, the proportion established by section 8009(d) is the proportion that the local tax revenues covered under the equalization program are of total local tax revenues attributable to current expenditures.

New Mexico statutes have reduced property tax limits to .5 mil levy which produces only$245,774 for educational use. Therefore, the State of New Mexico cannot claim over said amount.

Thank you for your consideration.

Sincerely,

/s/_____
Robert Gomez
Superintendent

Enclosure

**[FOLD OUT EXHIBITS]**

State of New Mexico
Public School Approved Operating Budget
Revenue 1999/2000



Fund Year 2000 District 043 GALLUP
Analyst Beverly Aguilar

| Fund | Fnct | Obj | | | | | Estimated Amount | Operating Budget Amount |
|---|---|---|---|---|---|---|---|---|
| 11000 | | 8101 | Resident'l/Non-Resident'l Taxes | | | | | |
| | | | Residential Taxes | 145,715,495.00 | X | .000259 | 245,756 | 245,169 |
| | | | Non-Residential Taxes | 414,857,900.00 | X | .000500 | 37,740 | |
| | | | Sub-Total | 560,573,395.00 | X | | 207,429 | |
| | | 8103 | Oil & Gas Taxes | | | | 245,169 | |
| | | | Oil & Gas Taxes | | | | | |
| | | | Total Assessed Valuation: | 1,209,198.00 | X | .000500 | 331 | 605 |
| | | | | 561,782,593.00 | X | | 605 | |
| | | | SUBTOTAL ASSESSED VALUATION | | | | 245,774 | |
| | | | | | | | 246,087 | 245,774 |
| | | 8201 | Fees-Activities | | | | | |
| | | 8202 | Fees-Educational | | | | | |
| | | 8205 | Fees-Users | | | | 148 | |
| | | 8302 | Rent and Leases | | | | 56,628 | 0 |
| | | 8303 | Sale of Pers./Real Prop./Equip. | | | | 121 | 75,000 |
| | | 8304 | Sale of Pers. Prop./Equipment | | | | 19,551 | 0 |
| | | 8307 | Insurance/Individual Recoveries | | | | 26,697 | 20,000 |
| | | 8312 | Refunds Prior Year | | | | 0 | 5,000 |
| | | 8313 | Interest | | | | 17,464 | 2,000 |
| | | | | | | | 41,753 | 5,000 |
| | | | SUBTOTAL LOCAL REVENUE | | | | 800,000 | 0 |
| | | | | | | | 1,208,449 | 800,000 |
| | | 8501 | State Equalization Guarantee | | | | 33,708,235 | 1,152,774 |
| | | 8512 | State Flowthrough Indirect Costs | | | | 2,500 | 38,767,156 |
| | | | SUBTOTAL STATE REVENUE | | | | 33,710,735 | 4,600 |
| | | | | | | | | 38,771,756 |
| | | 8603 | Impact Aid | | | | 20,555,637 | |
| | | 8604 | Forest Reserve | | | | 9,470 | 20,555,637 |
| | | 8605 | Federal Flowthrough Indirect Costs | | | | 145,370 | 9,470 |
| | | 8607 | Federal Direct Indirect Costs | | | | 112,355 | 165,022 |
| | | | SUBTOTAL FEDERAL REVENUE | | | | 20,822,832 | 112,000 |
| | | | | | | | | 20,842,129 |
| | | 8912 | Restricted 20% Revenue | | | | 0 | |
| | | | SUBTOTAL Restricted Revenue | | | | 0 | 4,162,176- |
| | | | | | | | | 4,162,176- |
| | | | SUBTOTAL OPERATIONAL | | | | 55,742,016 | 56,604,483 |
| | | 9111 | Unrestricted Cash | | | | 2,769,561 | |
| | | 9112 | Restricted Cash | | | | 86,069 | 2,414,999 |
| | | | SUBTOTAL CASH | | | | 2,855,630 | 33,986 |
| | | | | | | | | 2,448,985 |

Revenue/20

Attachment 5

GALLUP/MCKINLEY COUNTY SCHOOL DISTRICT (GMCS)
STIPULATED FACT SHEET #1

| CHOOL YEAR | GENERAL COUNTY SCHOOL TAX | STATE SCHOOL TAX IN GMCS DISTRICT | STATE SCHOOL TAX RATE | GMCS PL874 RECEIPTS | STATE CREDIT OF GMCS PL874 RECEIPTS | STATEWIDE PL874 RECEIPTS |
|---|---|---|---|---|---|---|
| 964-1965 | 244,272 | | 2.125 | 807,292 | | 6,542,163 |
| 965-1966 | 253,889 | | 2.125 | 969,691 | | 7,474,393 |
| 966-1967 | 258,574 | | 2.125 | 1,061,804 | | 8,220,207 |
| 967-1968 | 269,981 | | 2.125 | 928,455 | | 7,428,664 |
| 968-1969 | 353,742 | | 2.225 | 1,258,780 | | 8,400,844 |
| 969-1970 | 407,678 | | 2.225 | 1,784,151 | | 9,866,688 |
| 970-1971 | | | 2.225 | | | |
| 971-1972 | 456,519 | | 4.450 | 2,483,083 | | 14,644,866 |
| 972-1973 | 541,349 | | 4.450 | 3,885,148 | | 19,332,743 |
| 973-1974 | 523,575 | | 4.450 | 3,293,958 | | 13,911,646 |
| 974-1975 *1 | | 883,552 | 11.150 | 2,847,648 | 2,705,266 | 15,335,943 |
| 975-1976 | | 798,128 | 8.925 | 3,904,323 | 3,709,107 | 16,970,728 |
| 976-1977 | | 802,012 | 8.925 | 4,723,103 | 4,486,948 | 19,960,965 |
| 977-1978 | | 1,071,897 | 8.925 | 5,785,621 | 5,496,340 | 22,629,891 |
| 978-1979 | | 1,303,826 | 8.925 | 5,918,044 | 5,622,142 | 21,801,140 |
| 979-1980 | | 1,765,331 | 8.925 | 7,899,157 | 7,504,199 | 25,238,382 |
| 980-1981 *2 | | 2,085,528 | 4.500 | 8,472,998 | 8,049,348 | 26,353,613 |
| 981-1982 | | 791,785 | 2.500 | 4,540,146 | 4,313,139 | 19,653,627 |
| 982-1983 | | 557,505 | 0.500 | 9,359,686 | 8,891,702 | 32,187,465 |
| 983-1984 | | 359,567 | 0.500 | 10,391,867 | 9,871,514 | 29,285,162 |
| 984-1985 | | 216,826 | 0.500 | 10,890,689 | 10,346,079 | 34,009,741 |
| 985-1986 | | 259,578 | 0.500 | 10,457,884 | 9,934,990 | 34,265,871 |
| 986-1987 | | 283,295 | 0.500 | 13,339,685 | 12,672,701 | 38,110,083 |
| 987-1988 | | 197,577 | 0.500 | 6,382,161 | 6,063,053 | 26,239,152 |
| 988-1989 | | | 0.500 | | | |
| 989-1990 | | 368,232 | 0.500 | 7,651,881 | 7,269,287 | 31,628,727 |
| 990-1991 | | 249,975 | 0.500 | 11,701,342 | 11,117,225 | 32,695,249 |
| 991-1992 | | | 0.500 | | | |
| 992-1993 | | 257,691 | 0.500 | 9,868,886 | 9,375,366 | 31,213,354 |
| 993-1994 | | 267,576 | 0.500 | 6,343,947 | 6,026,750 | 25,979,514 |
| 994-1995 | | 257,469 | 0.500 | 9,497,891 | 9,023,496 | 28,394,040 |
| 995-1996 | | | 0.500 | 11,343,737.87 | 10,776,551 | 38,852,116 |
| 996-1997 | | | 0.500 | 18,965,548 | 18,017,271 | 42,955,792 |
| 997-1998 | | | 0.500 | 21,155,895 | 20,098,100 | 51,116,363 |
| 998-1999 | | | 0.500 | 19,484,889.85 | 18,510,645 | |
| 999-2000 | | | 0.500 | 24,654,010.50 | 18,490,508 *3 | |

*1 OF GENERAL COUNTY SCHOOL TAX
*2 NI LEAVES GMCS DISTRICT
*3 ATE REDUCES 95% CREDIT TO 75% AND ALLOWS GMCS TO KEEP 25% WITH 20% DESIGNATED FOR CAPITAL IMPROVEMENTS

## APPENDIX G

**ELEVENTH JUDICIAL DISTRICT COURT**
**COUNTY OF MCKINLEY**
**STATE OF NEW MEXICO**

**Case No. CV-98-II**

**[Filed October 14, 1999]**

THE ZUNI PUBLIC SCHOOL DISTRICT and SKYLAR MARTINEZ, by and through his next friends and parents, MALCOLM BOWEKATY and VURLENE BOWEKATY, JEFFREY M. JOHNSTON, by and through his next friends and parents, MADRELL and WILBUR JOHNSTON, ERIQ HASKIE SANCHEZ, by and through his next friends and parents, MARISA SANCHEZ, AMBER DEYSEE, by and through her next friends and parents, CAROLINE AND DEWEY DEYSEE, and CHARLES BOOQUA, JR., by and through his next friends and parents, MARLENE and CHARLES BOOQUA, SR,

*Plaintiffs*,

THE GALLUP-MCKINLEY SCHOOL DISTRICT NO. 1, THE GRANTS CIBOLA SCHOOL DISTRICT; CHRISTINE JOHNSTON by and through his/her next

friends and parent, GLORIA JOHNSTON; DORETTA LARGO by and through her next friend and parent CHARLES CHIA; TARA LORENZO by and through her next friend and parent DENNIS LORENZO; TROY SANDOVAL by and through his next friends and parents, DION SANDOVAL and JOLYNN WASETA; JUSTIN SUAZO by and through his next friends and parents, RITASUAZO and DALE SUAZO; WILLIAM GARCIA, MATTHEW GARCIA and SARAH GARCIA by and through their next friends and parents, GEORGE GARCIA and ISABEL GARCIA; KYLE NELSON and CHELSEA NELSON by and through their next friends and parents, TOM NELSON and PAM NELSON; and ERIN LEWIS and ERIK LEWIS by and through theirnext friends and parents, MARK LEWIS and MARIE LEWIS,

*Plaintiff-Intervenors*,

vs.

THE STATE OF NEW MEXICO and MICHAEL DAVIS, State Superintendent of Schools, in his official capacity,

*Defendants*.

**PARTIAL SUMMARY JUDGMENT**

This matter having Come before the Court on the Motion

for Partial Summary Judgment against Defendants, THE STATE OF NEW MEXICO and MICHAEL DAVIS, the Court having reviewed said Motion and Briefs submitted by both parties, having heard argument of counsel at the hearing held on June 30, 1999, and being fully advised in the premises, finds that said Motion is well taken and farther finds as follows:

1. The Plaintiffs and Plaintiffs/Intervenors are New Mexico school districts and the named students are students within those districts and areproper parties to bring this action.

2. Article XII, Section 1 of the New Mexico Constitution provides:

   A uniform system of free public schools sufficient for the education of, and open to, all children of school age in the State of New Mexico shall be established and maintained.

3. The current system for the funding of capital improvements for New Mexico's school districts violates Article XII, Section 1 of the New Mexico Constitution.

4. The ability of a school district to fund capital improvements is largely based upon the value of real property located within the district available to be taxed.

5. The ability of school districts to raise these capital improvement funds differs among districts because of the non-taxable nature of certain lands within school districts and the differing taxable values of lands

within the school districts and creates a lack of uniformity of funding capital improvements.

6. There is no state interest which justifies the current inequality in the ability of districts to fund capital improvements.

7. There are no genuine issues of material fact as to the current statutory method for raising capital improvement funds or as to the mandates of Article XII, Section 1 of the New Mexico Constitution.

8. There has been no showing that there are any possible conflicts of material facts which might develop as a result of any discovery which has not occurred, as the Defendants have all necessary information concerning the finances and abilities of the various districts to raise funds for capital improvements.

9. As the material facts are undisputed and only legal interpretation of facts remains, summary judgment is appropriate.

10. The Plaintiffs and Plaintiff-Intervenors are entitled to judgment as a matter of law.

11. This Partial Summary Judgment involves controlling questions of law as to which there is substantial ground for difference of opinion and an immediate appeal may materially advance the ultimate termination of this litigation.

**It Is Therefore, By The Court, Ordered, Adjudged And Decreed** as follows:

1. The Court has jurisdiction over the parties and the subject matter hereto.

2. The current system for funding capital improvements within New Mexico's school districts violates Article XII, Section 1 of the New Mexico Constitution.

3. The Defendants' request that a ruling on this Motion for Partial Summary Judgment be delayed until further discovery is conducted is ~~without merit~~ and is denied.

4. Plaintiffs' and Plaintiff-Intervenors' Motion for Partial Summary Judgment is granted.

5. The Defendants shall have until July 28, 2000, in which to establish and implement a uniform funding system for capital improvements for New Mexico school districts and for correcting existing past inequities, all to be within the mandates of Article XII, Section 1 of the New Mexico Constitution.

6. The Court reserves the right to hold status conferences on its own initiative or on the motion of any party as to the progress of establishment and implementation of this new funding system prior to July 28, 2000.

7. This Court shall review the plan developed by Defendants and may later impose further appropriate sanctions or conditions for failure to establish and implement an adequate and constitutional funding system.

8. ~~The Defendants shall not retaliate against Plaintiffs in any manner for the filing and prosecution of this action.~~

9. The Court reserves jurisdiction of all remaining issues not disposed of by this Judgment.

10. Defendants are entitled to an immediate appeal pursuant to § 39-3-4, N.M.S.A., 1978 Comp.

/s/
Joseph L. Rich,
District Judge

**APPROVED AS TO FORM:**

/s/
Bennett Cohn, Director Civil Litigation
Office of the Attorney General
P.O. Box 1508
Santa Fe, New Mexico 87504-1508
Attorney for Defendants

**SUBMITTED BY:**

/s/
George W. Kozeliski
P.O. Box 478
Gallup, New Mexico 87305
Attorney for Gallup-McKinley School District No. 1, et al.
ROTH, VANAMBERG, ROGERS, ORTIZ, FAIRBANKS & YEPA LLP

By /s/
Ronald J. VanAmberg
P.O. Box 1447
Santa Fe, New Mexico 87504-1447
Attorneys for Zuni Public School District, et al.

BOYNTON & SIMS WEST

By /s/_____

Bruce Boynton
P.O. Box 1239
Grants, New Mexico 897020
Attorneys for Grants Cibola County School District, et al.

## APPENDIX H

### IMPACT AID DISTRIBUTIONS TO NM DISTRICTS
1999-2000 Actual Receipts

Source: New Mexico Public School Finance Statistics Published by NM Department of Education, Fiscal Year 1999-2000 Actual

| DISTRICT | RECEIPTS | | TOTAL |
|---|---|---|---|
| Name | Operational | Capital | Receipts |
| Alamagordo | $1,627,364 | $406,841 | $2,034,205 |
| Albuquerque | $489,469 | $122,367 | $611,836 |
| Bernalillo | $2,809,874 | $702,468 | $3,512,342 |
| Bloomfield | $470,269 | $117,567 | $587,836 |
| Central | $14,693,773 | $3,673,443 | $18,367,216 |
| Cloudcraft | $2,172 | $543 | $2,715 |
| Clovis | $342,957 | $85,739 | $428,696 |
| Cuba | $1,233,109 | - | $1,233,109 |
| Dulce | $1,731,284 | $432,821 | $2,164,105 |
| Espanola | $37,551 | $8,264 | $45,815 |
| Farmington | $65,599 | - | $65,599 |
| Gallup | $18,013,031 | $4,479,160 | $22,492,191 |
| Grants | $542,584 | $155,881 | $698,465 |
| Jemez Mountain | $6,366 | $1,592 | $7,958 |
| Jemez Valley | $433,066 | $108,116 | $541,182 |
| Las Cruces | $76,398 | $19,100 | $95,498 |
| Las Vegas-West | $2,192 | - | $2,192 |
| Los Alamos | $226,261 | $56,565 | $282,826 |
| Los Lunas | $58,922 | $14,730 | $73,652 |
| Magdalena | $400,113 | $99,186 | $499,299 |

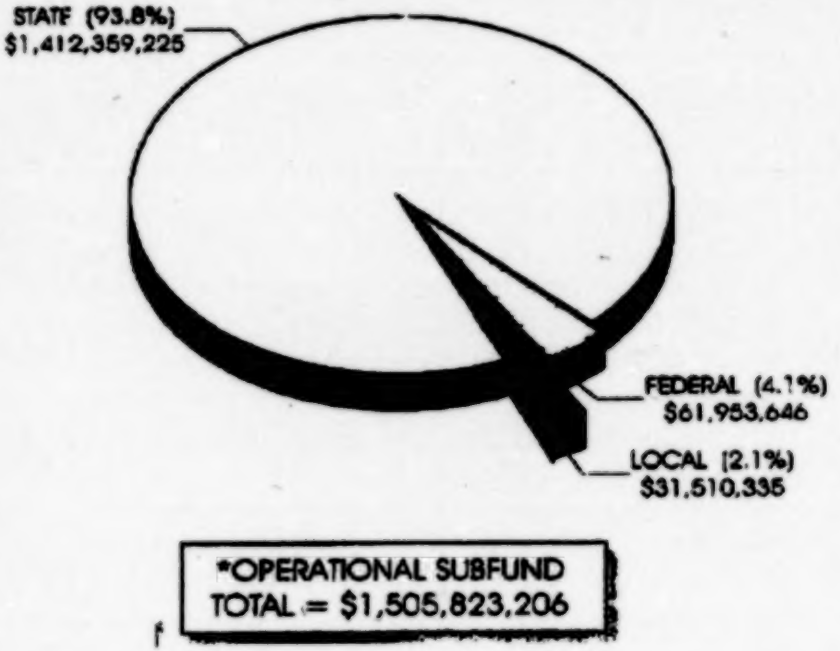
| DISTRICT | RECEIPTS | | TOTAL |
|---|---|---|---|
| Name | Operational | Capital | Receipts |
| Maxewell | $804 | - | $804 |
| Pecos | $172 | $43 | $215 |
| Penasco | $12,044 | $3,011 | $15,055 |
| Pojoaque | $745,955 | $186,488 | $932,443 |
| Raton | $1,184 | $296 | $1,480 |
| Ruidoso | $759,923 | - | $759,923 |
| Santa Fe | $921 | $230 | $1,151 |
| Taos | $35,534 | $8,883 | $44,417 |
| T of C | $106 | - | $106 |
| Zuni | $5,987,091 | $1,182,318 | $7,169,409 |

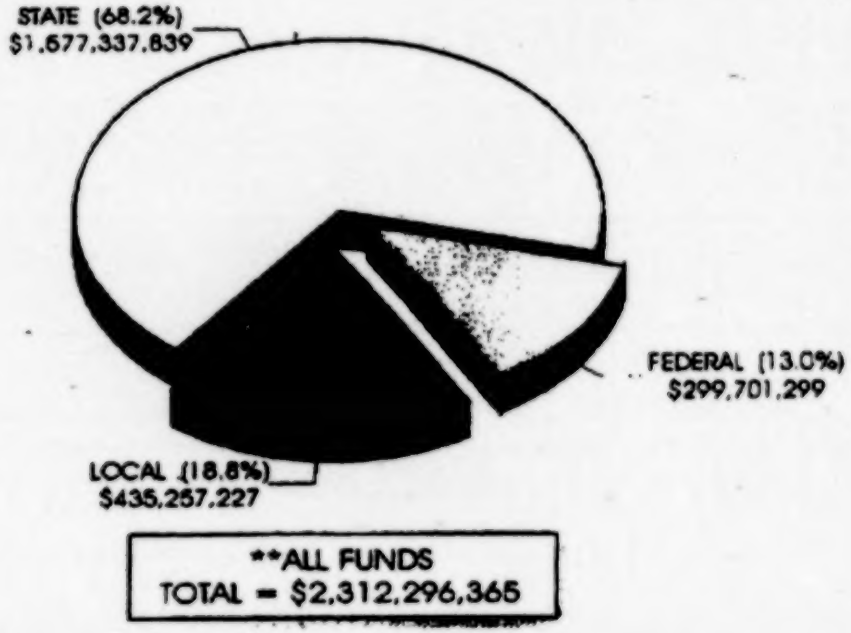
# APPENDIX I

## 1999-2000 ACTUAL RECEIPTS

**[FOLD OUT EXHIBIT]**

# 1999-2000 ACTUAL RECEIPTS




NOTES:
*The Operational Subfund total does not include $2,999,923 in abatements.
**Totals do not include $5,267,065 in abatements, donated commodities, and deferred sick leave accumulation.
SOURCE: 1999-2000 District Actual Receipts Report. (Does not include RCC/REC receipts).

## APPENDIX J

SCHOOL BUDGET & FINANCE ANALYSIS BUREAU

**TRAINING AND EXPERIENCE INDEX AND RANKING 2005-2006 FISCAL YEAR**

| DISTRICT | RANK | 10/04 INDEX FOR 2005-2006 FUNDING UNAUDITED T&E |
|---|---|---|
| Alamogordo | 43 | 1.117 |
| Albuquerque | 58 | 1.091 |
| Animas | 1 | 1.316 |
| Artesia | 19 | 1.173 |
| Aztec | 47 | 1.111 |
| Belen | 76 | 1.063 |
| Bernalillo | 21 | 1.168 |
| Bloomfield | 49 | 1.107 |
| Capitan | 40 | 1.119 |
| Carlsbad | 3 | 1.269 |
| Carrizozo | 12 | 1.190 |
| Central | 34 | 1.139 |
| Chama | 29 | 1.151 |
| Cimarron | 13 | 1.189 |
| Clayton | 30 | 1.149 |
| Cloudcraft | 25 | 1.154 |
| Clovis | 61 | 1.087 |
| Cobre | 17 | 1.178 |
| Corona | 81 | 1.051 |
| Cuba | 40 | 1.119 |
| Deming | 66 | 1.080 |

| DISTRICT | RANK | 10/04 INDEX FOR 2005-2006 FUNDING UNAUDITED T&E |
|---|---|---|
| Des Moines | 27 | 1.152 |
| Dexter | 72 | 1.070 |
| Dora | 4 | 1.242 |
| Dulce | 85 | 1.046 |
| Elida | 72 | 1.070 |
| Espanola | 53 | 1.104 |
| Estancia | 63 | 1.085 |
| Eunice | 79 | 1.055 |
| Farmingham | 54 | 1.100 |
| Floyd | 80 | 1.054 |
| Fort Sumner | 10 | 1.197 |
| Gadsden | 77 | 1.061 |
| Gallup | 82 | 1.050 |
| Grady | 59 | 1.090 |
| Grants | 21 | 1.168 |
| Hagerman | 78 | 1.059 |
| Hatch | 30 | 1.149 |
| Hobbs | 68 | 1.080 |
| Hondo | 57 | 1.092 |
| House | 86 | 1.029 |
| Jal | 23 | 1.167 |
| Jemez Mountain | 65 | 1.084 |
| Jemez Valley | 36 | 1.138 |
| Lake Arthur | 88 | 1.000 |
| Las Cruces | 69 | 1.076 |
| Las Vegas City | 34 | 1.139 |
| Logan | 5 | 1.226 |
| Lordsburg | 75 | 1.068 |
| Los Alamos | 20 | 1.172 |
| Los Lunas | 44 | 1.114 |
| Loving | 24 | 1.161 |

| DISTRICT | RANK | 10/04 INDEX FOR 2005-2006 FUNDING UNAUDITED T&E |
|---|---|---|
| Lovington | 47 | 1.111 |
| Magdalena | 37 | 1.136 |
| Maxwell | 14 | 1.185 |
| Melrose | 27 | 1.152 |
| Mesa Vista | 39 | 1.130 |
| Mora | 25 | 1.154 |
| Moriarty | 51 | 1.105 |
| Mosquero | 84 | 1.048 |
| Mountainair | 33 | 1.142 |
| Pecos | 37 | 1.136 |
| Penasco | 16 | 1.179 |
| Pojoaque | 70 | 1.074 |
| Portales | 68 | 1.077 |
| Quemado | 63 | 1.085 |
| Questa | 15 | 1.082 |
| Raton | 46 | 1.112 |
| Reserve | 18 | 1.174 |
| Rio Rancho | 72 | 1.070 |
| Roswell | 62 | 1.086 |
| Roy | 51 | 1.105 |
| Ruidoso | 8 | 1.206 |
| San Jon | 6 | 1.224 |
| Santa Fe | 71 | 1.071 |
| Santa Rosa | 32 | 1.146 |
| Silver | 7 | 1.211 |
| Socorro | 83 | 1.049 |
| Springer | 87 | 1.023 |
| Taos | 44 | 1.114 |
| Tatum | 2 | 1.271 |
| Texico | 9 | 1.203 |
| Truth or Conseq. | 60 | 1.089 |

| DISTRICT | RANK | 10/04 INDEX FOR 2005-2006 FUNDING UNAUDITED T&E |
|---|---|---|
| Tucumcari | 54 | 1.100 |
| Tularosa | 11 | 1.191 |
| Vaughn | 50 | 1.106 |
| Wagon Mound | 56 | 1.097 |
| West Las Vegas | 42 | 1.118 |
| Zuni | 49 | 1.107 |
| **STATEWIDE** | | 1.100 |